Supreme Court, U.S.
FILED

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No.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

APRIL BRANNAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a nonprofit student loan guaranty agency bound to follow the collection mandates of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1002 *et seq.*, is subject to the federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.*, which includes restrictions that directly conflict with the Higher Education Act and its implementing regulations.

PARTIES TO THE PROCEEDING

The petitioner is United Student Aid Funds, Inc., a nonprofit student loan guaranty agency. Petitioner's parent company is USA Group, Inc., a Delaware nonprofit corporation based in Indiana. The respondent is April Brannan.

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PETITION FOR A WRIT OF CERTIORARI

United Student Aid Funds, Inc. ("USA Funds") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-20a, is reported at 94 F.3d 1260. The opinion and final judgment of the district court, App., *infra*, at 21a-36a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. USA Funds filed a timely petition for rehearing with suggestion for rehearing *en banc*, which was denied on October 31, 1996. App., *infra*, at 36a. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(*1*) (1994).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.*, and selected portions of the Higher Education Act, 20 U.S.C. §§ 1001 *et seq.*, are reprinted in the Appendix. App., *infra*, at 37a-56a. Selected Higher Education Act regulations are reprinted in the Appendix. App., *infra*, at 56a-87a.

INTRODUCTION AND STATEMENT

This case raises a fundamental issue for the viability and operation of the principal federal student loan program. Most Americans who go to college depend on the Higher Education Act's ("HEA") program of guaranteed student loans ("GSL"). In the 1980s and early 1990s, high default rates threatened this important program. Congress responded with HEA amendments that mandated forceful collection activities by lenders and guarantors and gave them powerful collection tools to carry out the mandate.

If it applied to these activities, the Fair Debt Collection Practices Act ("FDCPA") would impose directly conflicting legal obligations on guarantors. It is legally impossible to comply simultaneously with the FDCPA and with the HEA and its implementing regulations. Before the subject ruling of the Ninth Circuit, there was no such conflict. In the uniform view of the federal courts and the agencies responsible for administering *both* statutes, the U.S. Department of Education ("Department") and the Federal Trade Commission ("FTC"), the FDCPA did not apply to guaranty agencies. That sensible situation has now changed.

As a private, nonprofit guarantor of federal student loans, petitioner USA Funds is required to engage in various "due diligence" activities relating to the collection of defaulted guaranteed student loans. If a guaranty agency fails to comply, the Department may take severe remedial actions against the nonprofit student loan guaranty

agency, ranging from a fine to suspension from further participation in the federal student loan program (which would be a death blow for a guaranty agency). *See* 34 C.F.R. §§ 682.410(c), 682.413(c)(1) (1996), App., *infra*, at 81a-85a, 85a-87a.

The FDCPA, in turn, squarely prohibits various communications and collection activities—some of which are explicitly *mandated* for nonprofit guaranty agencies by the HEA and applicable regulations. FDCPA violations may result in substantial civil liability; indeed, mere allegations of FDCPA violations against FDCPA-regulated entities may result in extensive litigation. *See* 15 U.S.C. § 1692k, App., *infra*, at 49a.

In this case the court of appeals held that the FDCPA applies to nonprofit student loan guaranty agencies participating in the federal student loan program. The decision has an immediate and profound effect on the administration of a massive federal program. Guaranty agencies administer billions of dollars in student loans, H. Rep. No. 102-447, 102d Cong., 2d Sess. at 8, *reprinted* in 1992 U.S.C.C.A.N. 334, 341, and nonprofit guaranty agencies like USA Funds must determine whether to comply with the FDCPA, as required by the court of appeals, or with the HEA and its regulations, as required by the Department. The decision of the court of appeals has created intolerable uncertainty about the governing legal requirements for this important program.

I. THE STATUTORY AND REGULATORY FRAMEWORK

A. The Higher Education Act and HEA Regulations

The Higher Education Act of 1965 carries out the federal government's support of postsecondary education,[1] a support described by President Johnson as even more important to the national interest than a strong military

[1] H. Rep. No. 102-447, 102d Cong., 2d Sess. at 6-7, *reprinted in* 1992 U.S.C.C.A.N. 334, 339-40 (recounting purposes of the Higher Education Act and its amendments).

defense.[2] Title IV of the HEA, 20 U.S.C. §§ 1070 *et seq.*, makes college possible for millions by authorizing federally-reinsured student loans.

The volume of federally-reinsured loans has grown dramatically since the HEA's inception. "Far from being a loan of convenience for students from middle income families, the Guaranteed Student Loan has become a loan of necessity for all students."[3] Between 1980 and 1990, student debt had increased almost threefold to over $50 billion.[4]

The fulcrum of the student loan program—which is now called the Federal Family Education Loan Program ("FFELP") in the HEA Title IV, Part B—is the student loan guarantor. The guarantor issues a guaranty to a lender so that the lender will make an unsecured loan to a student or her parents. The guarantor pays on the guaranty and becomes a "holder" of the note, *see, e.g.*, 20 U.S.C. § 1080a(c)(4), if it goes into a default, in turn claiming reinsurance from the U.S. Department of Education. Guarantors must either be state agencies or, like petitioner USA Funds, a private nonprofit organization. 20 U.S.C. § 1085(j). Nonprofit student loan guaranty agencies thus perform the important, socially desirable, and congressionally prescribed function of facilitating the extension of educational opportunities to qualified students in need of financial assistance.

In the 1980s and early 1990s, high rates of student defaults posed huge costs to the federal fisc and threatened the student assistance system. H. Rep. No. 102-447 at 10, *reprinted in* 1992 U.S.C.C.A.N. at 343. Because student financial aid is so important to the national fabric —and to staunch the loss of federal dollars—Congress

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[2] *Id.* at 340 (recounting President Johnson's message to the Congress in proposing HEA).

[3] *Id.* at 342.

[4] *Id.*

devoted almost constant attention to the HEA from 1985 through 1994. Congress amended the HEA nine times during that period.[5]

Many of those changes took the form of directions to guarantors and their regulator, the Department, to prevent defaults and to collect subsequently defaulted loans.[6] As a consequence, Title IV, Part B of the HEA now comprises almost 200 pages of statutory text. The statutory scheme is comprehensive. It dictates (for example) the terms by which the United States shall reimburse guarantor losses, 20 U.S.C. § 1078(b)(2), and the circumstances by which guarantors will pay lenders, *id.* § 1078(c)(2). The statute broadly authorizes the Department to enforce and interpret the HEA, *id.* § 1082(a), and to fine, suspend, or terminate guarantors who fail to carry out the HEA's provisions, *id.* § 1082(h)(1)(A). These amendments elaborate on the HEA's mandate that guarantors engage in "due diligence" collection efforts—defined, in part, as "collection practices at least as extensive and forceful as those generally practiced by financial institutions for the collection of consumer loans," *id.* § 1085(f)—and authorizes the Department of Education to specify the required "due diligence" activities, *id.* § 1082(a)(1).

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[5] *See, e.g.*, Consolidated Omnibus Reconcilation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82; Higher Education Act Amendments of 1986, Pub. L. No. 99-498, 101 Stat. 335; Higher Education Technical Act Amendments of 1987, Pub. L. Nos. 100-50, 101 Stat. 361, 362, 100-297, 102 Stat. 1818, 100-369, 102 Stat. 835-38; Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106; Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388; National and Community Service Act of 1990, Pub. L. No. 101-610, 104 Stat. 3150-56; Higher Education Act Technical Amendment of 1991, Pub. L. No. 102-26, 105 Stat. 123; Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, 105 Stat. 1049; Higher Education Act Amendments of 1992, Pub. L. Nos. 102-325, 106 Stat. 448, 103-208, 107 Stat. 2485.

[6] *See generally* Federal Family Education Loan Programs, 57 Fed. Reg. 60,280, 60,281-82 (Dec. 18, 1992) (recounting specific directions to the Department and other FFELP participants).

The Department has implemented these statutory directives through a detailed regulatory scheme that requires guaranty agencies to conduct detailed pre-and post-default activities. These required activities are designed to minimize the overall student loan default rate by "reduc[ing] defaults and increas[ing] collections on loans that go into default." Guaranteed Student Loan Programs, 55 Fed. Reg. 48,324 (Nov. 20, 1990); *see also* Federal Family Education Loan Programs, 57 Fed. Reg. 60,280, 60,282 (Dec. 18, 1992). The regulations explicitly require guaranty agencies to engage in the mandated "due diligence" activities as a precondition to reimbursement by the Department.[7] These "due diligence" activities serve the twin aims of reducing the ultimate loan default rate and promoting the continuing financial stability of the federal student loan program. *See* 55 Fed. Reg. 40,120 (Oct. 1, 1990). Without these collection activities, the defaulted loans would drain the pool of available loan funds, and ultimately restrict the number of students who are able to obtain post-secondary education.

The regulations prescribe the required pre- and post-default "due diligence" activities in detail. For example, within the first 45 days following payment on a guaranty to a lender, the guaranty agency is required to send the borrower several written notices that must contain specific information about the status of the loan, and must warn the borrower of the consequences of further non-payment. *See* 34 C.F.R. § 682.410(b)(5), App., *infra*, at 66a-67a. In addition, the regulations require the agency to "[d]iligently attempt" to contact the borrower by phone to demand repayment. *Id.* § 682.410(b)(6)(iii)(B). Over the next 135 days, the agency is again required to attempt to contact the borrower by phone, to send at least three notices "forcefully demanding" repayment from

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[7] *See* 34 C.F.R. § 682.406(a)(11) ("A guaranty agency is entitled to reinsurance payments on a loan only if . . . [t]he agency exercised due diligence in collection of the loan in accordance with [34 C.F.R.] § 682.410(b)(6) or (7)."), App., *infra*, at 58a.

the borrower, and to inform the borrower that their default has been reported to credit bureaus. *See* 34 C.F.R. § 682.410(b)(6)(iv), App., *infra*, at 72a. The agency then must either initiate tax refund offset proceedings or, if it concludes that the borrower is financially incapable of satisfying the repayment obligations, undertake "diligent semi-annual inquiries" to determine if the borrower has acquired sufficient assets to satisfy the debt. *See* 34 C.F.R. § 682.410(b)(6)(viii)(A), App., *infra*, at 73a-74a.[8] The guarantor may also initiate administrative proceedings to garnish the debtor's wages, which necessarily involves contacts with the debtor's employer. 34 C.F.R. § 682.410(b)(10), App., *infra*, at 78a-81a.

The nonprofit student loan guaranty agency thus is required to send the borrower various notices with particular information, contact the borrower by phone, advise the borrower of the potential legal action that may be taken in the event of further noncompliance, and ultimately, initiate legal or administrative proceedings as are necessary to recover the loan proceeds. *See* 34 C.F.R. §§ 682.410(b)(5)(vi); (b)(6)(iii)(A), App., *infra*, at 69a-70a, 71a. If the nonprofit student loan guaranty agency fails to comply with these "due diligence" requirements, the Secretary of Education may take remedial action against the agency, including fines and suspension from the FFELP program. 34 C.F.R. § 682.413, App., *infra*, at 85a-87a.

B. The Fair Debt Collection Practices Act

The FDCPA, in contrast, responds to a fundamentally different problem: that of "third persons who regularly collect debts for others." S. Rep. No. 382 at 3, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. The purpose of the FDCPA is "to eliminate abusive debt

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[8] The regulations also require the agency, in certain circumstances, to utilize "all available skip-tracing techniques" to locate a borrower, including seeking information from the IRS, credit bureaus, state motor vehicle departments, and the student's school. *See* 34 C.F.R. § 682.410(b)(6)(xii), App., *infra*, at 73a.

collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e), App., *infra*, at 37a.

The statute defines a "debt collector," in part, as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6), App., *infra*, at 38a. The statute then enumerates six specific categories that are excluded from the term: (1) the creditor exemption, 15 U.S.C. §§ 1692a (6)(A) & 1692a(4), App., *infra*, at 39a, 38a; (2) the common ownership exemption, 15 U.S.C. § 1692a(6)(B), App., *infra*, at 39a; (3) the government actor exemption, 15 U.S.C. § 1692a(6)(C), App., *infra*, at 39a; (4) the legal process exemption, 15 U.S.C. § 1692a(6)(D), App., *infra*, at 39a; (5) the consumer counseling exemption, 15 U.S.C. § 1692a(6)(E), App., *infra*, at 39a; and (6) a miscellaneous debt exemption (*i.e.*, debts incidental to a fiduciary or escrow arrangement; debts originated by the collector; debts not in default at the time obtained by the collector; and debts obtained as a secured party in a commercial credit transaction), 15 U.S.C. § 1692a(6)(F), App., *infra*, at 39a.

The FDCPA specifies various obligations for those entities subject to its provisions. The statute sets forth in detail permissible communications with the debtor, specifying, *inter alia*, limits on contact with a debtor at home and at work, 15 U.S.C. §§ 1692c(a)(1), (3), App., *infra*, at 41a; limits on the ability to provide any written or oral information to the debtor directly if the debtor is represented by counsel, 15 U.S.C. § 1692c(a)(2), App., *infra*, at 41a; limits on communications with third parties in connection with the collection of a debt, 15 U.S.C. § 1692c(b), App., *infra*, at 41a-42a; and requirements

that debt collectors cease communication with a debtor upon request, subject to a few defined exceptions, 15 U.S.C. § 1692c(c), App., *infra*, at 42a. The statute also specifies in detail the content of any notice sent to the debtor. 15 U.S.C. § 1692g, App., *infra*, at 47a-48a.

The FDCPA provides substantial civil liability for any violations. An entity subject to the FDCPA is subject to private lawsuits for (1) actual damages; (2) an additional fine (up to $1,000 for an individual and up to the lesser of $500,000 or 1% of the net worth of the entity in a class action); and (3) attorney's fees. 15 U.S.C. § 1692k (a), App., *infra*, at 49a-51a. Actions may be brought, without regard to the amount in controversy, in any federal district court or other court of competent jurisdiction. 15 U.S.C. § 1692k(d), App., *infra*, at 50a-51a. The statute also provides that the Federal Trade Commission shall enforce its provisions. 15 U.S.C. § 1692*l*, App., *infra*, at 51a.

II. THE LITIGATION

A. Respondent's Guaranteed Federal Student Loan And Default

1. The Loan—In June 1988, respondent Brannan received a guaranteed federal student loan of $2,625 from the Bank of Horton so that she could attend Edison Technical College. App., *infra*, at 22a. She executed a loan application and a promissory note. *Id.* The loan application form was approved by the Department, and bore petitioner USA Funds' logo. *Id.*

Respondent's loan was guaranteed by petitioner. As the district court explained, "[t]hrough its participation in the GSL program, [petitioner] and the program participants must meet the requirements of the [HEA] and the accompanying regulations. The specific obligations which [petitioner] is under are contained in the [HEA], its accompanying regulations, and the contractual agreements between [the Department] and [petitioner]." App., *infra*, at 22a.

2. *The Default*—In February 1990, six months after respondent ceased to be enrolled on at least a half-time basis, she became obligated to repay the loan in monthly installments. Specifically, she owed the unpaid principal ($2,625), simple interest at a rate of 8%, and any applicable late charges and collection costs. App., *infra*, at 23a. After sporadic payments, respondent failed to make a payment on November 1, 1990, and her delinquency continued for more than 180 days. On April 30, 1991, she was deemed in default. App., *infra*, at 22a-23a.

Accordingly, on May 23, 1991, the Bank of Horton's assignee declared respondent's loan in default and filed a default claim with petitioner. Petitioner paid the default claim, and, in June 1991, acquired all rights under the note. App., *infra*, at 23a.

In accordance with its agreement with the Department, USA Funds undertook various collection efforts regarding the defaulted loan. These efforts included sending collection notices directly to the borrower, as required by the Department regulations,[9] and contacting the borrower directly, as also required by the Department regulations.[10] App., *infra*, at 23a.

B. The District Court Litigation

In September 1992, respondent filed suit in federal district court against petitioner, alleging that petitioner's actions violated the FDCPA (as well as Oregon's State Trade Practices Act). Respondent's FDCPA claim asserted that petitioner had violated various FDCPA provisions, including sending collection notices directly to her and contacting her directly when she was represented by counsel. App., *infra*, at 25a.

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[9] *See* 34 C.F.R. § 682.410(b)(5)(ii)(A), App., *infra*, at 67a; *id.* § 682.410(b)(5)(vi), App., *infra*, at 68a-70a; *id.* § 682.410(b)(6)(iii)(A), App., *infra*, at 71a; *id.* § 682.410(b)(6)(iv)(B), App., *infra*, at 72a.

[10] *See* 34 C.F.R. § 682.410(b)(6)(iii)(B), App., *infra*, at 71a-72a; *id.* § 682.410(b)(6)(iv)(A), App., *infra*, at 72a.

Petitioner moved for summary judgment on the ground that the FDCPA did not apply to its activities; petitioner also moved for summary judgment on a counterclaim that it was entitled to the amount of the loan, plus applicable interest and collection costs. App., *infra*, at 29a-30a.

The district court granted petitioner's motion in all respects. It held that, "as a matter of law," the FDCPA is inapplicable to petitioner. App., *infra*, at 25a. Agreeing with a prior district court decision finding the FDCPA inapplicable to petitioner (*Games v. Cavazos*, 737 F. Supp. 1368 (D. Del. 1990)), the district court held that petitioner is "a government actor as defined in [the FDCPA]," and thus the FDCPA does not apply. App., *infra*, at 26a. The court emphasized the *Games* court's reasoning that some of the very actions alleged as the basis of the FDCPA violation were explicitly *required* under the Department of Education's regulations and contracts implementing the HEA. *Id.* at 27a. The court also emphasized the *Games* court's reasoning that the federal student loan program could be " 'administered by either a state guarantee agency or a private not-for-profit agency such as USA Funds,' " and that it would be "incongruous" to hold that the FDCPA does not apply to state guaranty agencies but that it does apply to functionally indistinguishable nonprofit student loan guaranty agencies. *Id.* at 27a-28a.

More broadly, the court stressed that Congress did not intend that the FDCPA apply to nonprofit student loan guaranty agencies. The court emphasized, as did the *Games* court, that the type of notices required under the HEA program was not "the type of activity Congress intended to regulate under the FDCPA," App., *infra*, at 28a; "unlike a typical debt collector," moreover, a student loan guaranty agency such as petitioner "is involved with a student loan from the beginning," and has "the power to resolve complaints from the borrower and exercise loan forbearance in appropriate cases." *Id.* Accordingly, the court concluded that "Congress did not intend the FDCPA to apply to guarantee agencies administering

the GSL program in cooperation with the [Department]." *Id.*[11]

C. The Court of Appeals' Decision

Respondent appealed, challenging the district court's conclusions that the FDCPA generally was not intended to apply to nonprofit student loan guaranty agencies and that the government actor exemption applied to such agencies. Almost two years after oral argument, the court of appeals reversed with regard to the applicability of the FDCPA.

The court of appeals recognized petitioner's position that "Congress did not intend for the FDCPA to apply to GSL guaranty agencies," but nevertheless determined that petitioner "is subject to the FDCPA." App., *infra,* at 4a. The court held generally that "[t]he FDCPA does not provide an exemption for guaranty agencies that acquire a student loan after default in order to pursue its collection." *Id.* The court also asserted, *sua sponte,* that "[t]he Secretary of Education has . . . explicitly stated that GSL third party collectors and their collection activity 'remain subject to the FDCPA.'" *Id.* (quoting 55 Fed. Reg. 40,120, 40,121 (1990)). With regard to the government actor exemption in particular, the court held that, under a canon of statutory construction applicable to the enumeration of specific parties, student loan agencies such as petitioner were excluded from the exemption: "[petitioner] is a private nonprofit organization with a government contract; it is not a government agency or employee." *Id.* at

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[11] The court also rejected two possible additional bases for the inapplicability of the FDCPA. *First,* it declined to rely on the general sentence regarding "debt collection" in the initial paragraph of 15 U.S.C. § 1692a(6): it concluded that, "[a]lthough [petitioner]'s principal business is not debt collection, it does regularly collect or attempt to collect defaulted GSL loans on behalf of the [Department] pursuant to their contractual agreements, the [HEA], and its accompanying regulations." App., *infra,* at 26a. *Second,* it declined to rely on the creditor exemption, concluding that petitioner "is only a guarantee agency," and does not "offer or extend credit." *Id.*

5a.[12] The court thus reversed the district court's judgment with regard to the FDCPA.[13]

Petitioner filed a petition for rehearing and suggestion for rehearing *en banc*, in which, *inter alia*, it explained that the panel had misunderstood the Department's statement because the Department's position is that the FDCPA does not apply to guaranty agencies. The petitioner attached a submission from the Department specifically responding to this misunderstanding. *See* App., *infra*, at 88a-92a. The Department's letter explained that the Department statement quoted by the court referred to independent, third-party servicers, *not* to nonprofit student loan guaranty agencies. The Department's submission also explained in detail the harm that would result from the court of appeals' holding:

> The practical effect of the ruling may be very detrimental to the 'minimum standard of collection action' prescribed by the Department. If guarantors are subject to the FDCPA, they would not pursue those prescribed collection actions where to do so would be prohibited or penalized by that Act. . . . These [FDCPA] restrictions, accompanied by the

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[12] The court of appeals also stated that petitioner "concedes for the purposes of this appeal that it is a 'debt collector' under the FDCPA." App., *infra*, at 4a. In fact, however, in defending the district court's judgment on its own terms (*see* note 11, *supra*), petitioner stated only that it "concedes for the limited purpose of this appeal that it 'regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due' the Department of Education" (Appellee's C.A. Br., at 32); petitioner vigorously argued that Congress never intended to apply the FDCPA to nonprofit student loan guaranty agencies, that the FDCPA does not apply, and that the government actor exemption applies. *See id.* at 10-39. The court of appeals recognized that petitioner had advanced those arguments, and addressed them. Accordingly, under the court of appeals' explicit reasoning, nothing in petitioner's purported "concession" is an obstacle to addressing the issue presented.

[13] The court of appeals also affirmed the district court's decision that the HEA preempts Oregon's statute, with one judge dissenting. App., *infra*, at 5a-20a.

> risk of substantial penalties for even technical violations, could only tend to deter guarantor compliance with the collection process already established by the Department.

App., *infra*, at 92a. The Department's submission attached two letters presenting the Federal Trade Commission's longstanding view that the FDCPA does not apply to nonprofit student loan guaranty agencies in the federal student loan program. App., *infra*, at 93a-97a.

On October 31, 1996, without comment, the court of appeals denied the petition for rehearing and suggestion for rehearing *en banc*. App., *infra*, at 36a. Less than one month later, on November 27, 1996, the Department of Education formally reiterated its view that the FDCPA does not apply to nonprofit student loan guarantors in the GSL program.[14]

REASONS FOR GRANTING THE PETITION

The issue presented—the applicability of the FDCPA to nonprofit student loan guaranty agencies for their conduct in carrying out the mandates of the HEA program—is of fundamental and recurring importance to the operation and administration of the massive federal student loan program. The court of appeals, moreover, decided the issue erroneously, and in a manner that conflicts with the administrative interpretations of the two federal agencies responsible for interpreting the pertinent statutes, and most courts that previously have considered the matter. Review by this Court is therefore warranted, and essen-

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[14] *See* 61 Fed. Reg. 60,478, 60,484-85 (Nov. 27, 1996), App., *infra*, at 98a ("It has been the longstanding view of the Secretary and the Federal Trade Commission that the FDCPA does not apply to guaranty agencies collecting defaulted FFEL Program loans in their own names and protecting the financial interests of their guarantee programs. The FDCPA does not apply to an entity collecting a debt it is owed. Moreover, application of the FDCPA to the guaranty agencies would potentially penalize them for compliance with the requirements in 34 CFR 682.410 and, thus, is inconsistent with the Secretary's goal of ensuring a minimum standard of collection action.").

tial to address inconsistent statutory and regulatory obligations created by the court of appeals' decision.

I. THE ISSUES ARE OF FUNDAMENTAL AND RECURRING IMPORTANCE

The applicability of the FDCPA to nonprofit student loan guaranty agencies raises a question that goes to the heart of the principal federal student loan program. By statutory and regulatory design, nonprofit student loan guaranty agencies play the major role in the operation of this program. The question presented here is whether nonprofit student loan guaranty agencies should, as has been previously believed, follow the commands of the HEA, the HEA regulations, and the Department's contracts and undertake specified collection actions; or whether those actions are prohibited by the FDCPA. The sanction for non-compliance with the FDCPA is substantial civil liability; the sanction for non-compliance with the HEA statutory, regulatory, and contract obligations ranges from fines to debarment altogether from the federal student loan program.

The FDCPA and the HEA impose inconsistent legal obligations. As the district court emphasized in this case, the HEA programs require direct communications with borrowers that the FDCPA prohibits. App., *infra*, at 27a. In addition, the HEA regulations mandate that a guaranty agency make "diligent" attempts to trace a borrower whose location is unknown, 34 C.F.R. § 682.410(b)(6)(xii), App., *infra*, at 75a, while the FDCPA prohibits more than one contact with a third party for this purpose, unless the initial information received was incorrect and correct information is now available, 15 U.S.C. § 1692b(3), App., *infra*, at 40a. The HEA regulations require communications with the borrower at specified intervals, 34 C.F.R. § 682.410(b)(6)(iii)-(ix), App., *infra*, at 71a-75a, while the FDCPA requires that a collector terminate communications at the borrower's request, 15 U.S.C. § 1692c(c), App., *infra*, at 42a. The HEA regulations require that an agency inform a borrower soon

after default that it will pursue civil suit if repayment is not forthcoming, 34 C.F.R. §§ 682.410(b)(5)(ii)(A), (b)(5)(vi)(L), App., *infra*, at 67a, 69a-70a, but subsequently permits the agency to decline to file suit if it is unlikely to lead to repayment, *id.* § 682.410(6)(vii)(B), App., *infra*, at 73a. Under the FDCPA, however, a collector is liable for "false misrepresentations" if it indicates it will file suit, but does not actually intend to do so. 15 U.S.C. § 1692e(4), (5), App., *infra*, at 44a. In all of these instances, a nonprofit student loan guaranty agency will face litigation alleging violations of one set of federal legal obligations by complying with another.

Furthermore, nonprofit student loan guaranty agencies are empowered to use the administrative wage garnishment provisions of 20 U.S.C. § 1095a. Use of the wage garnishment provisions, however, requires notice to the borrower's employer that there is a debt giving rise to the wage garnishment. Yet the FDCPA expressly prohibits any FDCPA-regulated entity from mentioning that a borrower owes a debt in any contact with a third person —including an employer. 15 U.S.C. § 1692c(b), App., *infra*, at 41a-42a. This too reflects the conflicting mandates of the FDCPA and the HEA.

The importance of the issue presented is especially pronounced because it directly affects the handling of a high volume of loans on a daily basis. Billions of dollars in loans nationwide are handled by guaranty agencies. *See* p. 3, *supra*.

In addition to the difficulties created by the inconsistent legal obligations of the FDCPA and the HEA, imposition of FDCPA liability is of fundamental and recurring importance because it will have significant adverse effects on the FFELP program. To the extent that, in compliance with the court of appeals' decision, nonprofit student loan guaranty agencies adhere to the FDCPA rather than the HEA requirements, the result will significantly compromise Congress's interest in the forceful collection of federally-reinsured student loans. As the Department has

emphasized, "application of the FDCPA to the guaranty agencies . . . is inconsistent with the Secretary's goal of ensuring a minimum standard of collection action." 61 Fed. Reg. at 60,485, App., *infra*, at 98a. As the district court also emphasized, in order to fulfill "the Congressional policy of vigorous enforcement of GSLs in default . . . the guarantee agency must be allowed to follow [Departmental] enforcement procedures." App., *infra*, at 28a-29a. The adverse impact thus will have a direct effect on the federal fisc. It also may well have a significant effect on the availability of student loans for those who wish to pursue a college education because a higher rate of defaults will deplete available federal funds (which are used to partially compensate guaranty agencies for default payments).

The issue presented is of particular importance, moreover, because the court of appeals' decision has produced sharply conflicting authority about requirements applicable to guarantors. Almost all courts that previously had addressed the issue had held that the FDCPA does not apply to nonprofit student loan guaranty agencies.[15] Indeed, although petitioner specifically directed the court of appeals' attention to the Iowa Supreme Court's *Fischer* decision and to the *Games* decision, the court failed even

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[15] *See Fischer v. Unipac Service Corp.*, 519 N.W.2d 793, 800 (Iowa 1994) ("[W]e believe that collection efforts by holders of federally insured student loans or their servicing companies are simply not the kind of activity Congress intended to regulate."); *Games v. Cavazos*, 737 F. Supp. 1368, 1388 (D. Del. 1990) ("[T]he sending of these notices by USA Funds and other private guarantee agencies in connection with their administration of the GSL Program is simply not the kind of activity Congress intended to regulate."); *Edler v. Student Loan Marketing Ass'n*, No. 92-1619, 1993 WL 652270 at *2 (D.D.C. Dec. 13, 1993) ("The FDCPA is . . . inapplicable to [the guaranty agency] as a matter of law."); *Leerssen v. United Student Aid Funds, Inc.*, No. 94CV4868 (Colo. Dist. Ct. Sept. 21, 1995). One state court has held to the contrary. *See Student Loan Fund of Idaho v. Duerner*, CV-OC-95-02576*D (Idaho Dist. Ct. Apr. 6, 1996), *rev. pending*, No. 23262 (Idaho).

to acknowledge the conflicting authority.[16] The two federal agencies with jurisdiction for administering the FDCPA and the HEA likewise have concluded, in conflict with the court of appeals, that the FDCPA does not apply to nonprofit student loan guaranty agencies in the federal student loan program. App., *infra,* at 88a-97a.

Furthermore, in light of the immediate, direct impact on the daily administration of millions of individual loans, this issue cannot be permitted to "percolate" as other courts consider the matter. The adverse effects—and the intolerable situation created for nonprofit student loan guaranty agencies, who face inconsistent legal obligations —are occurring on a daily and widespread basis, and will continue to do so, absent resolution by this Court.

Student financial assistance, indeed, is a nationwide program that demands uniform standards. This is especially true because at the time the loan is guaranteed, guarantors cannot predict whether their HEA-mandated conduct in the event of default will be adjudicated in the Ninth Circuit. For example, this case involves a Bank of Horton (Kansas) loan; a guarantor from Indiana; and a former student residing in Oregon. While the borrower in this case also went to school in Oregon, it is equally possible in any given loan situation that a student borrower will move away from school and then go into default in a different Circuit. It is impossible when originating or guaranteeing a loan for a guarantor to foresee that a student will leave school and then reside in a contradictory jurisdiction of the Ninth Circuit. Yet it is the fortuity of the former student's location that will determine the law applicable to the "due diligence" activi-

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[16] The conflict between the court of appeals' decision and the Iowa Supreme Court's *Fischer* decision is itself a sufficient basis for this Court's review. *See* S. Ct. Rule 10(a) (rev. 1995) (an important consideration for certiorari arises when a "United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort").

ties to which the courts will be forced to ascribe FDCPA significance.

Whether the Ninth Circuit's holdings—that the FDCPA applies to nonprofit student loan guaranty agencies and that the government actor exemption to the FDCPA does not apply to government-directed nonprofit student loan guaranty agencies—are correct or not, the issue should be promptly and definitively resolved. Uncertainty about applicable legal requirements in this far-reaching federal program serves no valid purpose, and operates only to harm guarantors, borrowers, and the federal government. Review by this Court is necessary to address the problems and uncertainty created by the court of appeals' decision.[17]

II. THE COURT OF APPEALS' INTERPRETATION IS ERRONEOUS

Contrary to the court of appeals' holding, the FDCPA should not be interpreted to apply to nonprofit student loan guaranty agencies.

At the outset, FDCPA applicability would conflict with congressional purpose and intent. The actions of nonprofit student loan guaranty agencies in the FFELP are far from the problem that Congress sought to address in

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[17] An additional possibility would be for this Court to grant the petition, vacate the judgment, and remand the case to the court of appeals for further consideration in light of the government's clarification of its position in the Department of Education's November 1996 *Federal Register* notice. In view of (1) the fact that the court of appeals' analysis seemed to rest on a "plain language" rationale, *see* App., *infra*, at 4a (emphasizing that statute does not enumerate specific exception for guaranty agencies); *id.* at 3a (emphasizing canon of statutory construction) and (2) the fact that petitioner presented the federal government's views to the court of appeals in the rehearing petition and the court took no further action, petitioner believes that it would be appropriate and preferable for this Court simply to grant the petition. Nevertheless, to the extent that the Department's subsequent reiteration might affect the court of appeals' analysis, an order to grant, vacate, and remand may be appropriate.

enacting the FDCPA. Congress in the HEA has commanded guaranty agencies to exercise a broad panoply of creditor rights, all of which are consistent with the guarantor's pre-claim involvement and eventual ownership of the note. *See* 20 U.S.C. § 1085a (identifying the guaranty agency as a holder). By contrast, the FDCPA was adopted to protect consumers against abusive practices by third party debt collectors. S. Rep. No. 382, at 2, *reprinted in* 1977 U.S.C.C.A.N. at 1696 ("The committee has found that debt collection abuse by *third party debt collectors* is a widespread and serious national problem." (emphasis added)). Nonprofit student loan guaranty agencies, moreover, undertake their activities at the direction of the federal government in order to implement an important federal program. Unlike independent collectors, who collect debts for a third party, nonprofit student loan guaranty agencies carry out their due diligence obligations at a time when they are the holder of the note, 20 U.S.C. § 1085a, and thus do not pose the same threat to consumers that Congress identified from independent collectors. Unlike independent collectors, nonprofit student loan guaranty agencies are involved with borrowers from the time a note is executed, rather than initiating communication only upon default. *See, e.g.*, App., *infra*, at 22a (noting that initial loan application bore petitioner's logo). Unlike independent collectors, nonprofit student loan guaranty agencies are governed by explicit restrictions established by the federal government, which spell out in detail the disposition of any collected funds. 20 U.S.C. § 1078(c)(2)(D); 34 C.F.R. § 682.410(a), App., *infra*, at 58a-64a.

Guaranty agencies such as petitioner thus are not characterized by the incentives which, Congress found, encourage third party collectors to engage in abusive practices.[18] Indeed, the HEA explicitly requires that guaran-

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[18] *See generally Games*, 737 F. Supp. at 1389; *Fischer*, 519 N.W.2d at 799 (compliance with the HEA due diligence requirements is not the type of activity Congress intended to regulate in enacting the FDCPA); App., *infra*, at 28a.

tors engage in collection practices "at least as extensive and forceful *as those generally practiced by financial institutions for the collection of consumer loans,*" 20 U.S.C. § 1085(f) (emphasis added)—and "financial institutions" engaged in "the collection of consumer loans" would not be subject to the FDCPA's prohibitions. Viewing the statute as a whole, in light of the congressional purpose, it is clear that the FDCPA should not be interpreted to apply to nonprofit student loan agencies discharging their responsibilities in the FFELP program.

In recognition of the HEA's comprehensive regulatory scheme, courts repeatedly have held that the HEA does not afford a private right of action. *See generally Bartels v. Alabama Commercial College, Inc.*, 918 F. Supp. 1565, 1574-75 (S.D. Ga. 1994) (collecting cases) ("[A]n overwhelming majority of the Courts who have considered this issue have also found that there is no private cause of action under the HEA."). This is so in part because a private right of action would "interfere with the broad enforcement powers of the Secretary." *Id.* at 1574. Yet allowing a private right of action under the FDCPA would go far beyond "interfer[ing]" with the HEA's administrative scheme, and create directly conflicting legal obligations for guarantors.

Furthermore, the non-applicability of the FDCPA is made clear by the government actor exemption. By its explicit terms, the statute exempts from FDCPA coverage government actors—*i.e.*, "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C), App., *infra*, at 39a. Although not government agencies, nonprofit student loan guaranty agencies undertake their activities at the explicit command of the federal government, in detailed instructions set forth in federal contracts, regulations, and statute. This express federal direction is true both generally, and specifically as it relates to the communication activities at issue under the FDCPA. Nonprofit student loan guaranty agencies perform the same

function as state guaranty agencies, moreover, and, under the HEA, only nonprofit student loan guaranty agencies and state agencies may perform the vital loan guarantee function. *See* 20 U.S.C. § 1078(b)(1); *Games*, 737 F. Supp. at 1382 ("The loan is insured by a State or private guarantee agency such as USA Funds.").

The *Games* court, moreover, squarely addressed this question, and found that petitioner itself was properly characterized as a government actor for purposes of the FDCPA exemption when participating in the federal tax offset program for recovery of defaulted student loan guarantees. The court explained that petitioner implemented a federal program involving federal dollars and exercised minimal discretion in conducting the challenged collection actions. 737 F. Supp. at 1382-83, 1387-88. Petitioner operated under like constraints when it contacted respondent to encourage repayment, and should be treated as a government actor.[19] The district court agreed with this analysis of the relationship between petitioner and the Department of Education, noting that, "[a]s a guarantee agency, [petitioner] has entered into numerous contractual agreements with the DOE whereby [petitioner] is bound by the Act and its accompanying regulations. . . ." App., *infra*, at 27a. The Ninth Circuit's summary discussion of the government actor issue fails to address these points, or even to acknowledge the comprehensive, conflicting discussion in *Games* and in the district court.

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[19] Indeed, the question in this case concerns the appropriate characterization of an entity closely directed and supervised by the government—an issue that, in various respects, this Court has addressed with frequency. *See, e.g., Richardson v. McKnight, cert. granted*, No. 96-318, 117 S. Ct. 504 (1996) (whether employees of state-hired private corrections company are entitled to qualified immunity); *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996) (whether government contractors are entitled to the same First Amendment protections that are applicable to government employees); *Board of County Commissioners v. Umbehr*, 116 S. Ct. 2342 (1996) (same); *Hercules Inc. v. United States*, 116 S. Ct. 981 (1996) (whether federal contractors who acted at government instruction in producing Agent Orange are entitled to compensation from government for settlement).

The FDCPA's definition of a "creditor"—which is not subject to FDCPA applicability—likewise establishes the non-applicability of the FDCPA to nonprofit student loan guaranty agencies. The FDCPA exempts "creditors"—*i.e.*, "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. §§ 1692a(4) & 1692a(6)(A), App., *infra*, at 38a, 39a. When a nonprofit student loan guaranty agency takes assignment of a guaranteed student loan following default by a borrower, as in this case, it becomes an entity "to whom a debt is owed." Moreover, nonprofit student loan guaranty agencies do not receive the assigned loan "solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4), App., *infra*, at 38a. While a nonprofit student loan agency remits *a portion* of any debts it successfully collects to the Department of Education for reimbursement of default claim advances, it retains a certain percentage of the collection proceeds to carry out its obligations under the HEA. 20 U.S.C. § 1078(c)(2)(C). In performing its statutory obligations, a nonprofit student loan guaranty agency does not collect, or receive the assignment, "solely for the purpose of facilitating collection of such debt for another." It becomes the holder of the note and retains the proceeds to administer the FFELP programs. Thus, a nonprofit student loan guaranty agency is a "creditor" under the FDCPA; accordingly, the FDCPA does not apply.

The error of the Ninth Circuit's holding is highlighted by the persuasive, abundant authority to the contrary. As discussed, almost every court that has addressed the issue, including the Iowa Supreme Court, previously has concluded that the FDCPA does not apply to nonprofit student loan guaranty agencies in the FFELP program.[20]

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[20] Although these courts emphasized different FDCPA provisions (such as the *Games* court's emphasis on the government actor exemption), they uniformly concluded that the FDCPA was not

The federal agencies responsible for administering the FDCPA and the HEA likewise explicitly have held the FDCPA inapplicable to the activities at issue.[21] The Ninth Circuit, in contrast, would allow private litigants to prosecute claims for actual and punitive damages against nonprofit student loan guaranty agencies bound to take "due diligence" and other collection steps in direct conflict with the prohibitions of the FDCPA. Thus steps taken by nonprofit student loan guaranty agencies to protect the federal fisc and promote "forceful" collection under the HEA, 20 U.S.C. § 1085(f), will result directly in claims for damages by private attorneys general supposedly vindicating the purposes of the FDCPA.

In actuality and by the plain terms of both the HEA and the FDCPA, Congress did not intend these bizarre results. The prohibitions of the FDCPA do not apply to nonprofit student loan guaranty agencies because that Act does not regulate such agencies; instead, nonprofit student loan guaranty agencies are regulated comprehensively and minutely by the HEA and its administrative framework.

The court of appeals' holding that the FDCPA applies to nonprofit student loan guaranty agencies in the federal student loan program represents a radical deviation from the settled understanding that had governed interpretation and implementation of both statutes, and should be reviewed by this Court.

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intended to apply to nonprofit student loan guaranty agencies in the federal student loan program. *See* note 15, *supra*.

[21] Indeed, although petitioner believes that the non-applicability of the FDCPA is clear from the statute, to the extent that there is any ambiguity, the federal agencies should receive deference. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-35555

APRIL BRANNAN,
Plaintiff-Appellant,

v.

UNITED STUDENT AID FUNDS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Oregon

John P. Cooney, Magistrate Judge, Presiding
No. CV-92-06229-JPC

Argued and Submitted Nov. 3, 1994

Decided Aug. 30, 1996

Before: FLETCHER, D.W. NELSON, and RYMER, Circuit Judges.

D.W. NELSON, Circuit Judge:

Appellant April Brannan seeks damages from appellee United Student Aid Funds, Inc. ("USA Funds"), claiming abusive collection practices in violation of the federal Fair Debt Collection Practices Act of 1977 ("FDCPA"),

Pub.L. No. 95-109, 91 Stat. 874, codified as amended at 15 U.S.C. § 1692 *et seq.*, and in violation of the Oregon Unfair Debt Collection Practices Act ("Oregon UDCPA"), Or.Rev.Stat. §§ 646.639, 646.641. The district court granted summary judgment in favor of USA Funds on all claims, holding that USA Funds is exempt from liability under the "government actor" exemption to the FDCPA, 15 U.S.C. § 1692a(6)(C), and that the Higher Education Act ("HEA"), 20 U.S.C. § 1071-99, preempts the Oregon UDCPA. Brannan appeals both these rulings. On appeal, USA Funds raises the affirmative defense of FDCPA preemption of the Oregon UDCPA for the first time. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part and reverse and remand in part.

FACTUAL AND PROCEDURAL BACKGROUND

On June 15, 1988, appellant April Brannan executed a promissory note with the Bank of Horton for a loan of $2,625 under the former Guaranteed Student Loan ("GSL") program [1] established by the HEA. USA Funds, a private guaranty agency [2] subject to the HEA and applicable regulations pursuant to its contracts with the United States Department of Education, guaranteed the loan. The Department of Education, in turn, insured the guaranty agency. After the lender's assignee declared Brannan in default and filed a default claim with USA Funds on May 24, 1991, USA Funds paid the loan in accord with its guarantee commitment [3] and began col-

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[1] The former GSL program is now the Federal Family Education Loan program, *see* 34 C.F.R. § 682.100(a) (1994), whereas the current GSL program encompasses loans guaranteed directly by the Department of Education, *see* 34 C.F.R. § 682.500 (1994).

[2] The Department of Education regulations define a guarantee agency as "[a] State or private nonprofit organization that has an agreement with the Secretary to administer a loan guarantee program under the [Higher Education] Act." 34 C.F.R. § 682.200(b) (1991).

[3] "If a borrower defaults on a loan, the guarantee agency or the Secretary reimburses the lender for its loss. The guarantee agency

lection efforts, including mailing collection notices to Brannan and contacting her by telephone.

Brannan filed suit on September 1, 1992, alleging, *inter alia*, that USA Funds had violated the FDCPA and the Oregon UDCPA by threatening to cause her to lose her job, by communicating with third parties about the debt, and by refusing to communicate about the debt through her attorney. USA Funds counterclaimed on the underlying debt, claiming collection costs and attorney fees under the provisions of the promissory note.[4]

The district court granted summary judgment to USA Funds on all counts of Brannan's complaint and on USA Funds' counterclaim. It held that USA Funds is exempt from the FDCPA pursuant to the "government actor" exclusion, 15 U.S.C. § 1692a(6)(C). It also held that the HEA completely preempts the Oregon UDCPA.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Stevens v. Moore Business Forms, Inc.*, 18 F.3d 1443, 1446 (9th Cir.1994). This case involves a statutory construction, which is a question of law that we review de novo. *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir.1992). Preemption is also a matter of law subject to de novo review. *Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir.1991).

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or the Secretary then collects the amount owed from the borrower." 34 C.F.R. § 682.102(c)(4) (1991).

[4] Brannan also sought a declaratory judgment regarding USA Funds' ability to recover collection costs that were calculated as a percentage of the debt. After USA Funds withdrew its claim for those costs, the district court ruled that paragraph VI of Brannan's promissory note entitles USA Funds to recover all actual collection costs. Brannan does not appeal this ruling.

DISCUSSION

I. APPLICABILITY OF THE FAIR DEBT COLLECTION PRACTICES ACT

USA Funds concedes for the purposes of this appeal that it is a "debt collector" under the FDCPA. 15 U.S.C. § 1692a(6). However, USA Funds asserts that Congress did not intend for the FDCPA to apply to GSL guaranty agencies.

We hold that USA Funds is subject to the FDCPA. The FDCPA proscribes abusive collection practices by "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* The FDCPA does not provide an exemption for guaranty agencies that acquire a student loan after default in order to pursue its collection. *See* § 1692 *et seq.* The Secretary of Education has also explicitly stated that GSL third party collectors and their collection activity "remain subject to the FDCPA." 55 Fed.Reg. 40120, 40121 (1990).

USA FUNDS AND THE GOVERNMENT ACTOR EXEMPTION

USA Funds contends and the district court held that a GSL guaranty agency is exempt from the FDCPA under § 1692a(6)(C), which exempts "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties."

Reversing the district court, we hold that USA Funds is not a government actor exempt from the FDCPA under § 1692a(6)(C). "[W]here a statute names the parties which come within its provisions, other unnamed parties are excluded." *Foxgord v. Hischemoeller,* 820 F.2d 1030, 1034 (9th Cir.), *cert. denied,* 484 U.S. 986, 108 S.Ct.

503, 98 L.Ed.2d 502 (1987). This exemption applies only to an individual government official or employee who collects debts as part of his government employment responsibilities. USA Funds is a private nonprofit organization with a government contract; it is not a government agency or employee.

II. HEA PREEMPTION OF THE OREGON UDCPA

USA Funds contends and the district court held that the HEA preempts the application of the Oregon UDCPA. Or.Rev.Stat. § 646.639. We agree. Although the HEA does not preempt all state law governing lenders and guarantors of student loans, it does preempt state law inconsistent with the GSL regulations governing a third-party debt collector's pre-litigation collection activities. *See* 55 Fed.Reg. at 40121-2.

A. PREEMPTION AND DEFERENCE TO AGENCY INTERPRETATION

"The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law." *Independent Energy Producers Ass'n, Inc. v. California Pub. Util. Comm'n*, 36 F.3d 848, 853 (9th Cir.1994). Preemption can occur in a number of circumstances, including " 'where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.' " *Id.* (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986)). " 'Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.' " *Id.* (quoting *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369, 106 S.Ct. at 1898-99).

The Secretary of Education has promulgated an official interpretation stating that regulations issued under 20 U.S.C. § 1082(a) preempt inconsistent state law governing pre-litigation collection activities by third-party debt

collectors. We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious or manifestly contrary to statute. *United States v. Strong*, 79 F.3d 925, 928 (9th Cir.1996) (citation omitted). We "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, —— U.S. ——, ——, 114 S.Ct. 2381, 2386, 129 L.Ed.2d 405 (1994) (citations omitted). "Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Id.*

B. THE GSL REGULATIONS AND STATE LAW

The Secretary concludes that the GSL regulations governing pre-litigation collection activity preempt all inconsistent state law, including case law, statutes and regulations. 55 Fed.Reg. at 40120-21 (*citing* 20 U.S.C. §§ 1078 (c), 1080(a),(b); 34 C.F.R. §§ 682.410(b)(4)(i)-(vi), (xii), 682.411(c)-(h)). According to the Secretary, state law is inconsistent with the GSL regulations when it "would prohibit, restrict, or impose burdens" on pre-litigation collection activity by third parties. Thus, the scope of preemption extends to "*any* State law that would hinder or prohibit *any* activity taken by these third parties." *Id.* at 40121 (emph. added).

The Secretary notes that preemption in this area expressly serves "the congressional intention implemented in these regulations:" that the Secretary establish an effective due diligence standard for collection activity. *Id.* Subjecting lenders and loan collectors to state law restrictions on pre-litigation collection activity would make GSL loan holders reluctant to exercise due diligence in loan collection. *Id.* In fact, the Secretary adds, exposure to lawsuits under fifty separate sets of laws and court systems could make lenders reluctant to make new federally-guaranteed student loans. *Id.*

The Secretary emphasizes that this narrow sphere of preemption has disadvantaged neither the states nor the public interest. The preemption of state law restrictions on pre-litigation collection activity "imposed no added costs on States" and did not infringe on state sovereignty in the conduct of litigation or the enforcement of judgments. *Id.* The subject of regulation—GSL loan collection—did not intrude into transactions in which the Federal Government had no direct involvement, but was instead "narrowly tailored" to apply to situations in which the federal government alone had already given financial benefits to borrowers and was in a position to incur even greater costs because of default. *Id.* Moreover, preemption did not leave borrowers without remedy should debt collectors engage in improper loan collection activity; while the GSL regulations preclude liability under inconsistent state law, "significant Federal protection for GSL debtors remain under the FDCPA." *Id.*

The Secretary recognizes that there are some competing state interests, but he makes clear that in accordance with the congressional intent embodied in the HEA, the public interest in having a stable student loan program is greater. For years, high default rates have been a serious threat to the continued viability of the GSL program. The interpretation concludes that

> [g]iven the strength of the public interest in preventing the need for Federal payments on defaulted loans, and in recovering those amounts after payment has been made, the Secretary believed at the time these regulations were promulgated, and continues to believe, that any balancing of interests between appropriate State regulation of collection actions on private debts and the need for a uniform minimum national standard of collection on publicly-financed loan debts tips decidedly in favor of diligent student loan collection. *Id.*

C. THE VALIDITY OF THE SECRETARY'S INTERPRETATION

One of the HEA's express purposes was to stabilize the GSL program by cutting the significnt losses to the U.S. Treasury due to the "costs and occurrences of defaults in the program." H.R.Rep. No. 383, 99th Cong., 2nd Sess. 4, *reprinted in* 1986 U.S.C.C.A.N. 2606. To this end, Congress directed the Secretary to establish minimum uniform due diligence requirements for loan collection, 20 U.S.C. § 1078, and authorized the Secretary to "prescribe such regulations as may be necessary to carry out the purposes" of the GSL program. 20 U.S.C. § 1082(a)(1). Because Congress has delegated to the Secretary its authority to implement the provisions of the HEA, the Secretary

> "is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' . . . and therefore, whether it should be preempted." *Medtronic, Inc. v. Lora Lohr,* —— U.S. ——, ——, 116 S.Ct. 2240, 2255, 135 L.Ed.2d 700 (1996) (citation omitted).

The Secretary's implementation of congressional intent is not arbitrary, capricious, or manifestly contrary to statute. The Secretary's regulations and interpretation ensure that loan collectors will be governed by one uniform standard for pre-litigation loan collection. If student loan guarantors were exposed to liability under fifty different sets of statutes, regulations and case law, conducting diligent pre-litigation collection activity could be an extremely uncertain and risky enterprise. Exposure to liability under state law would provide a significant disincentive to pursue loan collection, and the cost advantages gained by concentrating GSL loan collection in a centrally-administered system would be lost. Presumption does deprive some defaulters of the ability to receive damages under

state law; however, the congressional purpose in enacting the HEA was not to make it easier for defaulters to get money from loan collectors, but to protect the millions of students who would suffer irremediable loss if Congress had to shut down the GSL program.

Subsequent developments in the GSL program have shown the full force of the government's commitment to stabilize the GSL program by strengthening loan collection activity. In 1992, Congress amended § 1082(a)(1) to make its stated purpose even more explicit in the law—the Secretary's power to prescribe necessary regulations now expressly "includ[es] regulations applicable to third party servicers." Then, after years of "hemorraghing," *see*, "Stopping Loan Defaults," *Wash. Post*, at A22 (quoting the Secretary), in 1993 the government credited "tougher collection methods" as a main reason for a rapid decline in loan defaults. "Student Loan Defaults Down Due to Collection Methods," *Portland Oregonian*, July 20, 1993, at A6; *see also* "College Loan Defaults are Down," *Chicago Tribune*, July 20, 1993, at 8. Collection rates have continued to improve as the government has taken even stronger collection measures against defaulters. "Stopping Loan Defaults," *Wash. Post*, at A22. Clearly, maximizing the potential liability of loan collectors has not been a significant purpose behind GSL reform.

Upholding the Secretary's interpretation of congressional intent and the GSL regulations is not inconsistent with our holding in *Keams v. Tempe Technical Institute, Inc.*, 39 F.3d 222 (9th Cir.1994). The issue in *Keams* was whether the HEA preempted state tort suits against accrediting agencies. The Secretary's regulations with respect to accreditors were far more limited in scope than those governing loan collectors; the accreditor regulations merely provided a procedure for "determining whether to place an accrediting agency on the approved list." *Id.* at 226. The Secretary had not been charged with establish-

ing minimum standards for how accrediting agencies conduct their activity, and the Secretary had not issued any interpretation stating that the accreditor regulations preempt state law. Accordingly, we reasoned that state lawsuits could assist the Secretary in evaluating particular accrediting agencies, which would be operating under state law standards. Because state law did not stand " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' " it was not preempted by the HEA. *Id.* (quoting *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989)).

The present case concerns a different set of circumstances. Here, Congress has explicitly authorized the Secretary to "prescribe such regulations as may be necessary" to establish a uniform national standard for debt collection activity. 20 U.S.C. § 1082(a)(1). Consistent with the congressional charge, the Secretary has issued a regulatory framework for pre-litigation loan collection and has explained why recognizing liability under inconsistent state law "would thwart the congressional intention implemented in [the GSL] regulations." 55 Fed. Reg. at 40121. Because the Secretary's regulations and interpretation are reasonable and not inconsistent with the statute, we defer to the Secretary's policy determinations.

The Supreme Court's recent *Medtronic* holding also does not preclude preemption. *See* —— U.S. at ——, 116 S.Ct. at 2257 (statutory and regulatory language at issue in *Medtronic* do not preclude general state requirements from ever being preempted). Like the GSL regulations, the FDA regulations were issued in accordance with the congressional grant of authority under the relevant statute. *See id.* at ——, 116 S.Ct. at 2255. In contrast, however, the FDA regulations expressly state that they do " 'not preempt State or local requirements that are equal to, or substantially identical to, requirements imposed by or under the act.' " *Id.* at ——, 116 S.Ct. at 2256 (citing 21 C.F.R. § 808.1(d)(2)(1995)). The FDA

regulations also expressly provide that the coordinate statute does not preempt State unfair trade practices law. *Id.* at ——, 116 S.Ct. at 2257.

The interests addressed by the FDA regulations differ substantially from those of the GSL regulations. The GSL regulations concern a federal student loan program which requires uniformly administered collection standards in order to remain viable. In contrast, the FDA regulations touch upon purely private interests: the liability of manufacturers for defects in privately-produced goods.

D. THE GSL REGULATIONS AND OREGON LAW

Whereas the GSL regulations establish what the loan collector must do in order to show due diligence, the Oregon UDCPA consists entirely of restrictions and prohibitions on collection activity. 34 C.F.R. §§ 682.410(b)(4)(i)-(vi), (xii), 682.411(c)-(h); Or.Rev.Stat. § 646.639(2). For example, the GSL regulations establish that the debt collector shall diligently attempt to collect the loan by telephone and in writing throughout the first three forty-five day periods after default. 34 C.F.R. § 682.410(b)(4)(i)-(v). Then, in the fourth forty-five day period, the agency must send a written notice "forcefully" demanding payment. 34 C.F.R. § 682.410(b)(4)(vi). In contrast, the Oregon UDCPA consists of a list of collection practices that "[i]t shall be unlawful" for a debt collector to do. Or.Rev.Stat. § 646.639(2).

The preemptive effect of the GSL regulations is clear. The GSL regulations preempt "State law that would prohibit, restrict, or impose burdens" on the sequence of prelitigation contacts required by the GSL regulations; thus, "preemption includes *any* State law that would hinder or prohibit *any* activity" taken by third-party debt collectors prior to litigation. 55 Fed.Reg. at 41021 (emph. added). Because the Oregon UDCPA consists of nothing but prohibitions, restrictions and burdens on collection activity, it is preempted. If a student loan defaulter in Oregon

believes that a third-party debt collector has engaged in unfair pre-litigation debt collection activity, her remedy lies in the FDCPA, not the Oregon UDCPA. *Id.* ("while the GSL regulations preempt inconsistent State laws regarding pre-litigation collection activity, significant Federal protection for GSL debtors remains under the FDCPA").

III. FDCPA PREEMPTION OF THE OREGON UDCPA

On appeal, USA Funds raises for the first time its claim that the FDCPA itself preempts application of the Oregon UDCPA. This is a choice-of-law claim for avoidance of liability, rather than a choice-of-forum claim. *See* Fed.R. Civ.P. 8(c); *Piekarski v. Home Owners Savings Bank,* 956 F.2d 1484, 1489 (8th Cir.), *cert. denied,* 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147 (1992). Failure to raise an affirmative defense below results in waiver. *See, e.g., Harbeson v. Parke Davis, Inc.,* 746 F.2d 517, 520 (9th Cir.1984); *Santos v. Alaska Bar Ass'n,* 618 F.2d 575, 576-77 (9th Cir.1980). In particular, a choice-of-law preemption defense is waived if not raised below: only preemption issues affecting the choice of forum and thus raising questions of the court's jurisdiction may be raised for the first time on appeal. *Johnson v. Armored Transport of California, Inc.,* 813 F.2d 1041, 1043 (9th Cir.1987); *Gilchrist v. Jim Slemons Imports, Inc.,* 803 F.2d 1488, 1497 (9th Cir.1986). For these reasons, we decline to address this issue.

CONCLUSION

We hold that USA Funds, as a private guaranty agency under contract with the federal Department of Education to guarantee student loans, is subject to the FDCPA. We also hold that the HEA and the GSL regulations preempt the Oregon UDCPA. Therefore, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings consistent with this Opinion.

FLETCHER, Circuit Judge, concurring and dissenting:

I concur in the portion of the opinion that holds that United Student Aid Funds is not exempt from liability under the "Government Actor" exemption to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6)(C). I respectfully dissent, however, from the portion that holds that the Higher Education Act, 20 U.S.C. § 1071-99, preempts the Oregon Unfair Debt Collection Practices Act.

United Student Aid Funds concedes that it is a "debt collector" under the FDCPA. We hold that it is not a "Government actor" so that it is not exempt from compliance with the FDCPA requirements. The majority agrees that the HEA does not trump or preempt the FDCPA, since nothing in either statute suggests preemption of the other. The Oregon UDCPA provides that compliance with the FDCPA *is* compliance with Oregon's UDCPA. Or.Rev.Stat. § 646.643. All that can be at issue, then, in this case is whether the remedies available to the borrower, provided in the Oregon Act, applicable if the debt collector has violated the FDCPA, are preempted by the HEA. There appears to be no conflict between the HEA and the Oregon Act in *this* aspect of the UDCPA unless we were to hold that any remedy of the borrower against the debt collector for violation of the FDCPA is in conflict with the Secretary's HEA regulations.

In deciding whether the HEA preempts the Oregon UDCPA, "[O]ur sole task is to ascertain the intent of Congress." *Keams v. Tempe Technical Institute, Inc.*, 39 F.3d 222, 225 (9th Cir.1994) (quoting *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987)). Since Congress did not expressly preempt state law in the area of debt collection, the majority must rely on one or the other of the two remaining ways to find preemption: either that

"Congress intended to occupy the entire field, leaving no room for the operation of state law," *id.* at 225, or that "compliance with both state and federal law would be impossible, or state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.*

The first rationale has been foreclosed by *Keams*. The question in *Keams* was whether the HEA preempted state torts suits against accrediting agencies. In holding that it did not, we emphasized the fact that the HEA, i.e. Congress, *did* expressly preempt state law in a number of areas. *Id.* (citing 20 U.S.C. § 1099 (loans not subject to state disclosure requirements); 20 U.S.C. § 1078(d) (state usury laws inapplicable); 20 U.S.C. § 1091a(a) (state statutes of limitations inapplicable); 20 U.S.C. § 1091a(b) (state infancy defenses unavailable)).

> These express provisions for preemption of some state laws imply that *Congress intentionally did not preempt state law generally, or in respects other than those it addressed.* When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.

Id. (internal quotation omitted) (emphasis added). We rejected any inference of preemption based upon congressional intent to occupy the entire field. *Id.* "It is apparent from the language of the express preemption clauses that Congress expected state law to operate in much of the field in which it was legislating." *Id.* at 225-26. Because state laws regulating pre-litigation debt collection activities similarly are not expressly preempted by the HEA, I conclude that Congress did not intend to occupy the en-

tire field in the area of pre-litigation debt collection activities.

The majority appears to rely on the second rationale for preemption: the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. However, this rationale was rejected by the court in *Keams* with respect to negligence suits against accrediting agencies. It should similarly be rejected here.

There is a " 'presumption against finding pre-emption of state laws in areas traditionally regulated by the States.' " *Id.* at 225 (quoting *California v. ARC America Corp.*, 490 U.S. 93, 101, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989)). As the Supreme Court has recently reiterated,

> [B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.

Medtronic, Inc. v. Lohr, —— U.S. ——, ——, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996) (citations and internal quotation marks omitted). Regulation to prevent the deception or harassment of consumers is plainly within such an area of traditional state regulation. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) (regulation to prevent deceptive practices). Yet the majority opinion appears categorically to hold that *all* state laws that prohibit debt collectors from doing *anything* related to prelitigation federal debt collection are preempted as "incon-

sistent" with the HEA—regardless of the content of the state law.

This categorical approach is simply wrong. Absent a conclusion that Congress intended to occupy the entire field of pre-litigation debt collection activities, a position the majority appears properly to disclaim, we must look to the particular state law provision by provision in order to determine whether any provision is inconsistent with the HEA.

The majority relies heavily on the Secretary's Federal Register announcement to find preemption. However, preemption is a matter of *Congressional intent,* not the Secretary's. *See Keams,* 39 F.3d at 225; *California Fed. Sav. & Loan Ass'n,* 479 U.S. at 280, 107 S.Ct. at 689. To be sure, " 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.' " *Independent Energy Producers Ass'n v. California Pub. Util. Comm'n,* 36 F.3d 848, 853 (9th Cir.1994) (quoting *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 369, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986)). Thus, if the Secretary issued a regulation requiring a guarantor to contact a defaulted debtor at least once every three months, and a state law forbad contact more than twice a year, presumably the state law would be preempted. There is, however, no such allegation in the instant case. USA Funds does not contend that it is impossible to comply with both a particular GSL regulation and the Oregon UDCPA.

Ordinarily, when a statute is silent or ambiguous with respect to a particular issue, we defer to an agency's reasonable interpretation of the statute. *See Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).

> We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it

> left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Smiley v. Citibank (South Dakota), N.A., —— U.S. ——, ——, 116 S.Ct. 1730, 1733, 135 L.Ed.2d 25 (1996). These general principles do not readily apply in the preemption context. In evaluating a statute's preemptive effect, we presume that Congress does *not* intend to preempt in areas traditionally regulated by the state absent a clear manifestation of intent to the contrary. *Medtronic*, —— U.S. at ——, 116 S.Ct. at 2250. Thus, if Congress is silent as to its intent to preempt, we ordinarily find no preemption, especially where, as here, Congress has expressly preempted state law in other areas. *Keams*, 39 F.3d at 225. In such a situation, there is no reason to defer to an agency interpretation. *Cf. Smiley*, —— U.S. at ——, 116 S.Ct. at 1735 ("We may assume (without deciding) that the [question of whether a statute is preemptive] must always be decided *de novo* by the courts."); *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781 ("If the intent of Congres is clear, that is the end of the matter.").

Even assuming arguendo that some deference to the agency's interpretation is appropriate in this case, I still disagree with the majority's preemption analysis. The majority cites the Secretary for the proposition that "preemption includes *any* State law that would hinder or prohibit *any* activity" taken by third-party debt collectors prior to litigation. Maj. Op. at 1266 (citing 55 Fed.Reg. at 41021). "Because the Oregon UDCPA consists of nothing but prohibitions, restrictions and burdens on collection activity, it is preempted." *Id.* This is an overbroad interpretation of the regulations and of the scope of HEA preemption. The Secretary's pronouncement is

in a section entitled "Contacts With Borrowers by Demand Letters and Telephone Calls." 55 Fed.Reg. at 41021. It explains that "the Department's regulations require lenders and agencies to make a number of contacts with the borrower directly, at specified intervals, using particular warnings to attempt to persuade the borrower to repay the loan." *Id.* It continues, "These provisions therefore preempt State law that would prohibit, restrict, or impose burdens *on the completion of that sequence of contacts. . . .*" *Id.* (emphasis added). "[T]his preemption includes any State law that would hinder or prohibit any activity taken by these third parties *to complete these required steps.*" *Id.* (emphasis added). Thus, contrary to the majority's suggestion, the regulations do not purport to preempt *all* state laws that prohibit, restrict, or impose burdens on activity taken by third-party debt collectors prior to litigation, but only those state laws that prohibit, restrict or impose burdens on activity taken by third parties *to complete these required steps.* Only those state laws that prohibit or burden compliance with the HEA or GSL regulations are preempted.

There are many provisions of the Oregon UDCPA that in no way prohibit or burden compliance with the HEA or GSL regulations. For instance, the Oregon UDCPA prohibits a debt collector, while collecting or attempting to collect a debt, from "us[ing] or threaten[ing] the use of force or violence to cause physical harm to a debtor or to the debtor's family or property." Or.Rev.Stat. § 646.639 (2)(a). It also prohibits a debt collector from "us[ing] profane, obscene or abusive language in communicating with a debtor or the debtor's family." *Id.* § 646.639 (2)(d). Yet, by concluding that the entire Oregon UDCPA is preempted, the majority inexplicably finds these statutory provisions "inconsistent" with the HEA and its implementing regulations.

How can that be? All that the HEA says about debt collection is that the guaranty agreement shall "assure that due diligence will be exercised in the collection of loans insured under the program." 20 U.S.C. § 1078(c)(2)(A). There is nothing inconsistent about requiring a guarantor to use "due diligence" in attempting to collect the loan but telling the guarantor to refrain from using violence or abusive language in doing so. "Due diligence" does not mean collection by any means possible—no matter how abusive and unfair. In fact, in the federal Fair Debt Collection Practices Act (FDCPA), Congress explicitly concluded that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts." 15 U.S.C. § 1692(c). Accordingly, Congress enacted legislation "to eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e). There is no exception for prelitigation student loan debt collection. In light of Congress's express pronouncement in the FDCPA that abusive and misleading debt collection practices are *not* necessary to effective debt collection, I do not understand how a state statute prohibiting violence, abusive language, and misrepresentations in collecting debts can be deemed inconsistent with Congress's desire effectively to collect unpaid student debts under the HEA. The purpose of the HEA is to provide deserving students with loans so that they are able to attend college. Preserving the solvency of the program is a necessary means to that end. Abusive and misleading pre-litigation practices by debt collectors attempting to collect student loans in no way further these goals, and are certainly not required or encouraged by the GSL regulations. The effect of today's majority opinion is to free institutions not subject to the FDCPA but which collect student loans from regulation against violent or abusive practices and to free those subject to the FDCPA from state borrower remedies that are intended to discourage such practices.

USA Funds "ha[s] not demonstrated that preemption of [Brannan's Oregon UDCPA claims] was the 'clear and manifest purpose of Congress.'" *Keams*, 39 F.3d at 227 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). We should reverse the district court's ruling that finds complete preemption.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-6229-CO

APRIL BRANNAN,

Plaintiff,

v.

UNITED STATES AID FUNDS, INC.,

Defendant.

ORDER AND OPINION

COONEY, Magistrate Judge:

This is a civil action in which plaintiff seeks to recover damages for alleged violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and Oregon State Trade Practices Act (OSTPA), ORS 646.639 and 646.631. Plaintiff has also requested declaratory relief on the terms of her loan agreement. The court has jurisdiction pursuant to 15 U.S.C. § 1692(k)(d). Defendant has filed a counterclaim seeking to recover the amount of the debt and attorney fees in accordance with the loan agreement. Before this court is defendant's motion for partial summary judgment regarding: the applicability of the FDCPA to United States Aid Funds, Inc. (USA FUNDS), plaintiff's motion for declaratory judgment, preemption of OSTPA by the Higher Education Act, and defendant's counterclaim for the amount of the debt and attorney fees.

I. FACTS

In making the following findings, I consider the evidence in the light most favorable to the plaintiff.

Plaintiff, April Brannan, was the recipient of a guaranteed student loan under the Guaranteed Student Loan (GSL) Program established by the Higher Education Act (ACT), 20 U.S.C. § 1071 *et seq.*. (Affidavit of April Brannan pg. 1, 3, hereafter referred to as BA; Affidavit of Kevin Tharp pg. 3-4, hereafter referred to as TA; Affidavit of Andrew Lewis Exhibit A pg. 2-3, Exhibit pg. 2, hereafter referred to as LA.) Plaintiff applied for and received the loan from the Bank of Horton in order to attend Edison Technical College. (TA pg. 3-4; LA Exhibit A pg. 2-3, Exhibit pg. 2). In connection with this loan, plaintiff executed an application and a promissory note in the amount of $2,625. (LA Exhibit a, pg. 2-3; Exhibit B pg. 2; TA Exhibit A). The loan application form was approved by the DOE and bore USA Funds' logo. (TA pg. 3-4).

The loan was guaranteed by USA Funds, a private, nonprofit guaranty agency whose loan insurance program has been approved by the department of Education (DOE) for participation in the GSL program, and who is subject to the Act pursuant to various contractual agreements with the DOE. TA pg. 1-2.). Through its participation in the GSL program, USA Funds and the program participants must meet the requirements of the Act and the accompanying regulations. The specific obligations which USA Funds is under are contained in the Act, its accompanying regulations, and the contractual agreements between the DOE and USA Funds. (TA pg. 1-2, 4).

Pursuant to the provisions of the note, plaintiff agreed to repay the amount of the loan in monthly installments beginning, February 1, 1990, six months after the date on which she ceased to be enrolled on at least a half-time

basis. (TA pg. 4). At that time, the amount due on the loan consisted of the following:

the unpaid principle in the amount of $2,625.

all simple interest, not payable by the DOE, at a rate of 8% on the unpaid principal balance until that balance was paid.

any applicable late charges and collection costs in accordance with the loan agreement.

The plaintiff did not receive an authorized deferment or forbearance on her loan payments. Plaintiff's repayment obligation has not been canceled or discharged. (LA Exhibit A pg. 5, Exhibit B pg. 3).

According to defendant's records, plaintiff made sporadic payments on her loan and failed to make her payment due on November 1, 1990. (TA pg. 5). The delinquency on her November 1, 1990 payment continued for a period of more than 180 days. As a result, plaintiff was deemed in default of her loan on April 30, 1991. (Id).

On May 23, 1991, lender's assignee declared plaintiffs's loan in default and filed a default claim with USA Funds. (Id.). Pursuant to USA Funds' guarantee obligation, it paid the defaulted loan. On June 31, 1991, USA Funds acquired all rights under the note. (Id.).

USA Funds, in accordance with their agreement with the DOE, engaged in collection efforts, including:

1) sending collection notices directly to the borrower, as required under 34 C.F.R. §§ 682.410(b)(4)(iii)(A), (b)(4)(iv)(B), (b)(4)(v)(B) and (b)(4)(vi) and

2) contacting the borrower directly, as required under 34 C.F.R. §§ 682.410(b)(4)(iii)(B), (b)(4)(iv)(A), and (b)(4)(v)(A).

Under the terms of the note, defendant is entitled to collection costs if the loan is referred to a third party collection agency which is subject to the provisions of the FDCPA. (TA Exhibit A pg. 2,4). The plaintiff also agreed in the note, to "pay all charges and other costs, including the statutorily authorized fees of an outside attorney and court costs that are permitted by federal law and regulations for the collection of this loan." (Id.). USA Funds has incurred costs in pursuing plaintiff for payment as required under 34 C.F.R. § 682.410. (TA pg. 5). Defendant has also incurred attorney fees and court costs in an attempt to collect this loan.

II. LEGAL STANDARDS

A. *Summary Judgment*

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact." *See Bhan v. NME Hosp's, Inc.*, 929 F.2d 1404, 1409 (9th Cir.) *cert. denied*, 112 S.Ct. 617 (1991). The moving party must carry the initial burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The party meets this burden by identifying portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Id.* In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the non-moving party. *Clemons v. Dougherty County*, 684 F.2d 1365, 1368-69 (11th Cir. 1982). All reasonable doubts must be resolved in the non-movant's favor. *Id.*

If the moving party meets their burden, the burden shifts to the opposing party to present specific facts showing there is a genuine issue for trial. *See Intel Corp. v. Hartford Acc. and Indem. Co.*, 952 F.2d 1551, 1558 (9th

Cir. 1991), *See also, Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986). If the moving party presents evidence which, taken by itself, would establish the right to a directed verdict at trial, the motion for summary judgment must be granted, in the absence of any significant probative evidence tending to support the opposing party's theory of the case. *Thi-Hawaii v. First Commerce Financial Corp.*, 627 F.2d 990, 993-94 (9th Cir. 1980); *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968). Conclusory allegations, unsupported by facts, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

III. DISCUSSION

Defendant moves for summary judgment regarding plaintiff's first, second, and third claims for relief. In addition, defendant also moves for summary judgment regarding their first claim for relief.

PLAINTIFF'S FIRST CLAIM FOR RELIEF

In plaintiff's first claim for relief, she alleges that defendant violated several provisions of the FDCPA by engaging in certain collection procedures, including sending collection notices directly to the borrower after she was represented by counsel, and contacting borrower directly by telephone after she was represented by counsel. Plaintiff also claims several things said during this telephone conversation violates the FDCPA. This court finds as a matter of law that the defendant is not subject to the FDCPA. There is no genuine issues of material fact; therefore, defendant's motion for summary judgment on plaintiff's first claim for relief is granted.

In order for defendant to be held liable under the FDCPA it must be a debt collector as defined by the FDCPA. The FDCPA defines the term debt collector:

(6) The term debt collector means any person who uses any instrumentality of interstate commerce . . . in

any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another . . . ". 15 U.S.C. § 1692 (a)(6). The FDCPA also includes listed exceptions to this general definition. *See* 15 U.S.C. § 1692(a)(A)-(F).

USA Funds argues that it is not a debt collector within the meaning of the FDCPA because debt collection is not their principal business purpose. USA Funds' principal business purpose is to act as a guarantee agency for the GSL program. Although USA Funds' principal business is not debt collection, it does regularly collect or attempt to collect defaulted GSL loans on behalf of the DOE pursuant to their contractual agreements, the Act, and its' accompanying regulations.

USA Funds also argues that it falls under the exception of creditor and therefore the FDCPA does not apply. 15 U.S.C. § 1692(a)(4) defines a creditor as: any person who offers or extends credit. It does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

In this case, USA Funds is only a guarantee agency, they did not offer or extend credit. This is the role of the lender under the GSL program. In addition, although USA Funds may have technically been the holder of the note, they did receive assignment or transfer of the note in order to facilitate collection on behalf of the DOE. Ultimately, it is the DOE that is the recipient of any funds which USA Funds would collect from plaintiff. For the foregoing reasons, USA Funds is not a creditor as defined by the FDCPA.

USA Funds argues that it is a government actor as defined in 15 U.S.C. § 1692(a)(C). The court agrees. USA Funds is a private, non-profit corporation which

operates as a guarantee agency participating in the federal GSL loan program pursuant to the Higher Education Act 20 U.S.C. §§ 1071 *et seq.*. The GSL program makes low interest loans available to students to pay for the cost of post-secondary education. Lenders loan the funds and a guarantee agency insures them against loss. 34 C.F.R. § 682.100(a). As a guarantee agency, USA Funds has entered into numerous contractual agreements with the DOE whereby USA Funds is bound by the Act and its accompanying regulations. (TA pg 1-2). Pursuant to these regulations, USA Funds is required to make certain minimum contacts with a borrower in default of a GSL in order to facilitate collection of the loan.

Plaintiff, in this case, alleges that these contacts are the basis of violations of the FDCPA. In *Games v. Cavazos,* 737 F.Supp. 1368 (D.Del. 1990), the court found that USA Funds was a government actor when it sent out certain notices required under DOE regulations. In *Games,* USA Funds had no discretion as to the form or content of the letters. In this case, although USA Funds may have some discretion with regard to the content of their telephone calls to the debtor, and to a lesser extent minimal discretion as to the content of letters sent to plaintiff, it is still contractually bound to make these minimum contacts under DOE regulations. DOE regulations require the sending of notices directly to the borrower and making phone calls directly to the borrower at certain prescribed times. There is no discretion with regard to these required activities. *See* 34 C.F.R. §§ 682.410(4)(b)(iii)-(vi).

In addition, the court in *Games* examined the administrative role of USA Funds in the GSL loan program. They recognized that the GSL could be "administered by either a state guarantee agency or a private not-for-profit agency such as USA Funds." *Games,* 737 F.Supp. at 1388 citing 20 C.F.R. § 1072(a)(1). The *Games* court found that it would be

> "incongruous to hold USA Funds to the requirements of the FDCPA when it administered the very same federal government loan program as the state guarantee agencies that are excepted by § 1692(a)(6)(C)'s exception for government actors. Since state guarantee agencies would not be subject to the FDCPA . . . private agencies . . . should likewise be protected. This protection extends to all aspects of the private guarantee agencies administration of the Guaranteed Student Loan program." *Id.*

The *Games* court also found that the sending of notices as required under the GSL program was not the type of activity Congress intended to regulate under the FDCPA. *Games.* 737 F.Supp. at 1389. The FDCPA is intended to eliminate abusive debt collection practices by debt collectors and to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged. 15 U.S.C. § 1692(e). The Act makes it unlawful for debt collectors to use abusive tactics while collecting debts for others and imposes civil liability on debt collectors for violations of the FDCPA. *Games,* 737 F.Supp. at 1389. The court noted that unlike a typical debt collector, USA Funds is involved with a student loan from the beginning. They also have the power to resolve complaints from the borrower and exercise loan forbearance in appropriate cases. *Id.* The court went on to say that Congress did not intend the FDCPA to apply to guarantee agencies administering the GSL program in cooperation with the DOE. *Id.*

This court agrees with the reasoning in *Games* and agrees that the FDCPA should not apply to private guarantee agencies under the GSL program. In addition, the Congressional policy of vigorous enforcement of GSLs in default as evidenced by the DOE regulations regarding minimum contacts and due diligence when a borrower is in default supports the argument that the FDCPA should not apply when guarantee agencies are carrying

out those requirements. In order to accomplish this goal the guarantee agency must be allowed to follow DOE enforcement procedures. *See Juras v. Aman Collection Service, Inc.*, 829 F.2d 739, 743 (9th Cir. 1987) (court allowed school to withhold transcripts of a student borrower who defaulted on his GSL as part of the due diligence requirements).

The court may in its discretion reach pendent state claims even when the federal claims are dismissed before trial. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903-904 (9th Cir. 1989); *See also Klaus v. Hi-Shear Corporation*, 528 F.2d 225, 231 (9th Cir. 1975). When the court has invested substantial time and energy in a case, it may in its discretion, choose to resolve pendent state claims even if the federal claims have been dismissed. *Rosado v. Wyman*, 397 U.S. 397, 404-405 (1970); *State of Arizona v. Cook Paint and Varnish Co.*, 541 F.2d 226, 227-228 (9th Cir. 1976). In this case, although summary judgment has been granted against plaintiff's first claim for relief, thereby eliminating her FDCPA claims, this court has expended substantial time and energy resolving these issue and in the interest of judicial economy and in avoiding a multiplicity of law suits, chooses to resolve the remaining pendent claims.

PLAINTIFF'S SECOND CLAIM FOR RELIEF

Defendant has moved for summary judgment regarding plaintiff's second claim for declaratory relief. Plaintiff asks the court to interpret certain terms of the loan agreement. Plaintiff asks that any collection charges authorized under the agreement are limited to actual reasonable costs incurred. Defendant, as stated in their answer, seeks only actual collection costs incurred by USA Funds in pursuing the plaintiff for payment as required under 34 C.F.R. § 682.410. Defendant can collect these costs as costs incurred under paragraph VI of the note, or if USA Funds referred the account to an outside collection agency

subject to the FDCPA, it could recover those costs under paragraph V of the note.

Plaintiff also asks the court to limit the costs mentioned in paragraph VI to costs incurred and related to a court action. The language of the contract does not limit costs to court or litigation costs and this court cannot change the terms of the contract. Based upon the foregoing, defendant's motion for summary judgment on plaintiff's second claim for relief is granted, and defendant's recovery of collection costs is limited to actual costs expended in the collection of plaintiff's debt.

PLAINTIFF'S THIRD CLAIM FOR RELIEF

Defendant moves for summary judgment regarding plaintiff's third claim for relief. Plaintiff alleges that defendant's collection activities violated Oregon's State Trade Practices Act (OSTPA), ORS 646.639 *et seq.* In this case, federal law regarding the GSL program preempts Oregon's state law which interferes with or prohibits contacts that are required under DOE regulations.

There are several ways federal law may supersede state law. First, Congress can state in express terms that state law is preempted. Second, preemption may be inferred when the scheme of federal regulations completely occupies the field and thereby leaves no room for state regulation. Third, federal law will preempt state law to the extent that state law conflicts with federal law. This conflict can occur when compliance with state law and federal law would be impossible or when the state law stands as an obstacle to the accomplishment of Congressional objectives. *California Fed. Sav. and Loan Assn. v. Guerra,* 479 U.S. 272, 280-281 (1987) (citations omitted).

In this case, although there is no express preemption, it can be inferred from Congressional intent. There is an extensive body of federal law governing the GSL program

pursuant to 20 U.S.C. § 1071 *et seq* and regulations issued pursuant to 34 C.F.R. § 682 *et seq*. The regulations prescribe in detail the activities a guarantee agency or lender must engage in when a borrower defaults on a GSL. 34 C.F.R. §§ 682.410(b)(4), 682.411. In addition, the Secretary has issued a notice of interpretation which clearly states that the regulations regarding minimum contacts with the borrower in default preempt any inconsistent state law that would pose an obstacle to efforts to comply with GSL regulations. 55 Fed. Reg. 40120 (1990). The Secretary specifically states that regulations requiring demand letters and telephone calls to the borrower preempt state law which would prohibit, restrict, or impose burdens on the completion of the sequence of required contacts. *Id.* The activities which plaintiff alleges violate OSTPA were activities in connection with the DOE requirements. Therefore, Oregon's law is preempted by the DOE regulations.

Not only is federal law comprehensive regarding the obligations, rights and remedies under the Act but OSTPA stands as an obstacle to the Congressional purpose and intent to collect GSL in default. In addition, there is also a need for national uniformity in regulations that govern guarantee agencies. Allowing different states to impose their own restrictions on these agencies would create administrative problems for all these agencies who administer a national program, and thereby frustrate the Congressional purpose of making these loans more available to students. Based on the foregoing discussion, defendant is entitled to summary judgment as a matter of law on plaintiff's third claim for relief.

DEFENDANT'S COUNTERCLAIM

Defendant also moves for summary judgment regarding its counterclaim for the indebtedness and for attorney fees. Plaintiff admits executing the promissory note and receiving the loan funds in the amount of $2,625. (LA Exhibit

A pg. 2-3, Exhibit B pg. 2). Plaintiff also admits that defendant is the holder of the note, that plaintiff has not received an authorized deferment or forbearance, and that her repayment obligation has not been discharged. (LA Exhibit A pg. 5, Exhibit B pg. 3).

Plaintiff agreed to repay the loan in monthly installments beginning February 1, 1990, six months after the date on which she ceased to be enrolled on at least a half-time basis. (TA pg. 4) At that time the repayment obligation consisted of the unpaid principal balance in the amount of $2,625, all simple interest, not payable by the DOE, at the rate of 8% per annum, and any applicable late charges and collections costs. 34 C.F.R. § 682.102(2). As stated in the facts, plaintiff's loan was deemed in default on April 30, 1991. (Ta pg. 5). As of September 1, 1992, the balance of the loan was $2,371.72 excluding attorney fees and collection costs. (TA pg. 5).

USA Funds has incurred some collection costs in attempting to collect this loan. Under the note, paragraph V, plaintiff agreed to pay collection costs that arose when her loan was assigned to a third party collection agency who is subject to the FDCPA. Plaintiff also agreed to pay, under paragraph VI, any costs or charges arising out of the collection of this loan. Defendant can collect its own collection costs under paragraph VI or any costs incurred if it assigned the account to an outside collection agency. Any collection costs are limited to actual costs incurred.

Plaintiff is also obligated to pay attorney fees and court costs for the collection of her loan as provided for in paragraph VI of the note. Based on the above discussion, defendant is entitled to summary judgment as a matter of law on their counterclaim for the amount of the debt, $2,318.86, plus interest at the rate of 8%, actual collection costs, court costs and attorney fees. Defendant shall also recover interest on the judgment in accordance with 28 U.S.C. § 1961, until it is paid.

IV. CONCLUSION

Based upon the foregoing, defendant's motion for summary judgment is granted. Defendant has 11 days from the notice of the entry of judgment to file a Bill of Costs. Local Rule 265-1. Included with the Bill of Costs defendant shall provide a detailed accounting of all sums expended on the actual collection of the debt and supporting affidavits. Court costs and attorney fees will be determined in accordance with Local Rules 265-1 and 265-4.

DATED this 6th day of April, 1993.

/s/ [Illegible]
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 92-6229-CO

APRIL BRANNAN,
Plaintiff,

v.

UNITED STUDENT AID FUNDS, INC.,
Defendant.

FINAL JUDGMENT

In its Order and Opinion filed April 7, 1993, the Court granted Defendant's Motion for Partial Summary Judgment (#21) and ruled that Defendant is entitled to judgment on all of Plaintiff's claims, and on Defendant's counterclaim for the debt and for attorney fees and costs. It appears from the record and files herein that Defendant is entitled to entry of final judgment. Now, therefore, IT IS HEREBY:

ORDERED AND ADJUDGED as follows:

1. Defendant is awarded a money judgment against Plaintiff consisting of the sum of the following:

a. The principal amount of $2,371.72;

b. Interest on the principal amount of $2,371.72 at the rate of 8 percent per annum from September 1, 1992, until the date this Final Judgment is entered;

c. Attorney fees and costs in an amount to be determined. Defendant shall file a bill of costs and petition for attorney fees in accordance with Local Rule 265; and

d. Interest on the sum of the amounts awarded in the above subparagraphs a, b and c at the rate of 3.37 per-

cent per annum from the date this Final Judgment is entered until paid, pursuant to 28 U.S.C. § 1961.

2. All of the parties' remaining claims are hereby dismissed with prejudice.

DATED this 29 day of April, 1993.

/s/ John P. Cooney
United States Magistrate Judge

APPENDIX C

[Filed Oct. 31, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-35555
DC No. CV-92-06229-JPC

APRIL BRANNAN,
Plaintiff-Appellant,
v.

UNITED STUDENT AID FUNDS, INC.,
Defendant-Appellee.

ORDER

Before: FLETCHER, D.W. NELSON and RYMER, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Fletcher and Rymer voted to reject the suggestion for rehearing en banc, and Judge Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

STATUTORY AND REGULATORY PROVISIONS

15 U.S.C. § 1692 *et seq.* (1994):

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 1692a. Definitions

As used in this subchapter—

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instru-

mentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

§ 1692c. Communication in connection with debt collection

(a) Communication with consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate at postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer,

his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false or deceptive means to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business

name if such name does not indicate that he is in the debt collection business.

§ 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is

disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 1692i. Legal actions by debt collectors

(a) Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

§ 1692j. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

§ 1692k. Civil Liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

(1) In any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States

district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Commission

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 1692l Administrative enforcement

(a) Federal Trade Commission

Compliance with this subchapter shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another agency under subsection (b) of this section. For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act, a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law

Compliance with any requirements imposed under this subchapter shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act [12 U.S.C. §§ 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act, by the National Credit Union Administration Board with respect to any Federal credit union;

(4) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary

of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section.

(d) Rules and regulations

Neither the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter.

§ 1692m. Reports to Congress by the Commission

(a) Not later than one year after the effective date of this subchapter and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Commission deems necessary or appropriate. In addition, each report

of the Commission shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Commission under section 1692*l* of this title.

(b) In the exercise of its functions under this subchapter, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692*l* of this title.

§ 1692n. Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

§ 1692o. Exemption for State regulation

The Commission shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

20 U.S.C. § 1071 (1994):

§ 1071. Statement of purpose; nondiscrimination; and appropriations authorized

(a) Purpose; discrimination prohibited

(1) Purpose

The purpose of this part is to enable the Secretary—

(A) to encourage States and nonprofit private institutions and organizations to establish adequate loan insurance programs for students in eligible institutions (as defined in section 1085 of this title),

(B) to provide a Federal program of student loan insurance for students or lenders who do not have reasonable access to a State or private nonprofit program of student loan insurance covered by an agreement under section 1078(b) of this title,

(C) to pay a portion of the interest on loans to qualified students which are insured under this part, and

(D) to guarantee a portion of each loan insured under a program of a State or of a nonprofit private institution or organization which meets the requirements of section 1078(a)(1)(B) of this title.

20 U.S.C. § 1078 (1994):

§ 1078. Federal payment to reduce student interest cost

(c)(2) Contents of guaranty agreements

The guaranty agreement—

* * * *

(G) shall prohibit the Secretary from making any reimbursement under this subsection to a guaranty agency when a default claim is based on an inability to locate the borrower, unless the guaranty agency, at the time of filing for reimbursement, certifies to the Secretary that diligent attempts have been made to locate the borrower through

the use of reasonable skip-tracing techniques in accordance with regulations prescribed by the Secretary . . . .

* * * *

20 U.S.C. § 1082 (1994):

§ 1082. Legal powers and responsibilities

* * * *

(g) Civil penalties

(1) Authority to impose penalties

Upon determination, after reasonable notice and opportunity for a hearing, that a lender or a guaranty agency—

(A) has violated or failed to carry out any provision of this part or any regulation prescribed under this part, or

(B) has engaged in substantial misrepresentation of the nature of its financial charges,

the Secretary may impose a civil penalty upon such lender or agency of not to exceed $25,000 for each violation, failure, or misrepresentation.

* * * *

Section 682.406 of 34 C.F.R. provides in pertinent part:

§ 682.406. Conditions of reinsurance coverage.

(a) A guaranty agency is entitled to reinsurance payments on a loan only if—

(1) The lender exercised due diligence in making, disbursing, and servicing the loan as prescribed by the rules of the agency;

(2) With respect to the reinsurance payment on the portion of a loan represented by a single disbursement of loan proceeds—

(i) The check for the disbursement was cashed within 120 days after disbursement; or

(ii) The proceds of the disbursement made by electronic funds transfer or master check in accordance with § 682.207(b)(1)(ii) (B) and (C) have been released from the restricted account maintained by the school within 120 days after disbursement;

(3) The lender provided an accurate collection history and an accurate payment history to the guaranty agency with the default claim filed on the loan showing that the lender exercised due diligence in collecting the loan through collection efforts meeting the requirements of § 682.411, including collection efforts against each endorser;

(4) The loan was in default before the agency paid a default claim filed thereon;

(5) The lender filed a default claim thereon with the guaranty agency within 90 days of default;

(6) The lender resubmitted a properly documented default claim to the guaranty agency not later than 60 days from the date the agency had returned that claim due solely to inadequate documentation, except that interest accruing beyond the 30th day after the date the guaranty agency returned the claim is not reinsured unless the lender files a claim for loss on the loan with the guarantor together with all required documentation, prior to the 30th day;

(7) The lender satisfied all conditions of guarantee coverage set by the agency, unless the agency reinstated guarantee coverage on the loan following the lender's failure to satisfy such a condition pursuant to written policies and procedures established by the agency;

(8) The agency paid or returned to the lender for additional documentation a default claim thereon filed by the lender within 90 days of the date the lender filed the

claim or, if applicable, the additional documentation, except that interest accruing beyond the 60th day after the date the lender originally filed the claim is not reinsured;

(9) The agency submitted a request for the payment on a form required by the Secretary no later than 45 days following payment of a default claim to the lender, which must take place no earlier than 90 days following default in the case of a loan payable in monthly installments, or no earlier than 30 days following default, in the case of a loan payable in less frequent installments;

(10) The loan was legally enforceable by the lender when the agency paid a claim on the loan to the lender;

(11) The agency exercised due diligence in collection of the loan in accordance with § 682.410(b)(6) or (7);

(12) The agency and lender complied with all other Federal requirements with respect to the loan including the payment of origination fees;

(13) The agency assigns the loan to the Secretary, if so directed, in accordance with the requirements of § 682.409; and

(14) The guaranty agency certifies to the Secretary that diligent attempts have been made by the lender and the guaranty agency under § 682.411(g) to locate the borrower through the use of reasonable skip-tracing techniques.

Section 682.410 of 34 C.F.R. provides:

§ 682.410. Fiscal, administrative, and enforcement requirements.

(a) *Fiscal requirements*—(1) *Reserve fund assets.* A guaranty agency shall establish and maintain a reserve fund to be used solely for its activities as a guaranty agency under the FFEL Program ("guaranty activities"). The guaranty agency shall credit to the reserve fund—

(i) The total amount of insurance premiums collected;

(ii) Funds received from a State for the agency's guaranty activities, including matching funds under section 422(a) of the Act;

(iii) Federal advances obtained under sections 422(a) and (c) of the Act;

(iv) Federal payments for default, bankruptcy, death, disability, closed schools, and false certification claims;

(v) Supplemental preclaims assistance payments;

(vi) Administrative cost allowance payments received under § 682.407 and transitional support payments received under section 458(a) of the Act;

(vii) Funds collected by the guaranty agency on FFEL Program loans on which a claim has been paid;

(vii) Investment earnings on the reserve fund; and

(ix) Other funds received by the guaranty agency from any source for the agency's guaranty activities.

(2) *Uses of reserve fund assets.* A guaranty agency may use the assets of the reserve fund established under paragraph (a)(1) of this section to pay only—

(i) Insurance claims;

(ii) Operating costs for the agency's guaranty activities, including payments necessary in collecting loans, providing preclaims assistance, monitoring enrollment and repayment status, and carrying out any other guaranty activities;

(iii) Lenders for their participation in a loan referral service under section 428(e) of the Act;

(iv) The Secretary's equitable share of collections;

(v) Federal advances and other funds owed to the Secretary;

(vi) Reinsurance fees;

(vii) Insurance premiums related to cancelled loans;

(viii) Borrower refunds, including those arising out of student or other borrower claims and defenses;

(ix) (A) The repayment, on or after December 29, 1993, of amounts credited under paragraphs (a)(1)(ii) or (a)(1)(ix) of this section, if the agency provides the Secretary 30 days prior notice of the repayment and demonstrates that—

(*1*) These amounts were originally received by the agency under appropriate contemporaneous documentation specifying that receipt was on a temporary basis only;

(*2*) The objective for which these amounts were originally received by the agency has been fully achieved; and

(*3*) Repayment of these amounts would not cause the agency to fail to comply with the minimum reserve levels provided by paragraph (a)(10) of this section, except that the Secretary may, for good cause, provide written permission for a payment that meets the other requirements of this paragraph (a)(2)(ix)(A).

(B) The repayment, prior to December 29, 1993, of amounts credited under paragraphs (a)(1)(ii) or (a)(1)(ix) of this section, if the agency demonstrates that—

(*1*) These amounts were originally received by the agency under appropriate contemporaneous documentation that receipt was on a temporary basis only; and

(*2*) The objective for which these amounts were originally received by the agency has been fully achieved.

(x) Any other payments necessary to perform functions directly related to the agency's guaranty activities and for their proper administration;

(xi) Notwithstanding any other provision of this section, any other payment that was allowed by law or regu-

lation at the time it was made, if the agency acted in good faith when it made the payment or the agency would otherwise be unfairly prejudiced by the non-allowability of the payment at a later time; and

(xii) Any other amounts authorized or directed by the Secretary.

(3) *Accounting basis.* Except as approved by the Secretary, a guaranty agency shall credit the items listed in paragraph (a)(1) of this section to its reserve funds upon their receipt, without any deferral for accounting purposes, and shall deduct the items listed in paragraph (a)(2) of this section from its reserve fund upon their payment, without any accrual for accounting purposes.

(4) *Accounting records.* (i) The accounting records of a guaranty agency must reflect the correct amount of sources and uses of funds under paragraph (a) of this section.

(ii) A guaranty agency may reverse prior credits to its reserve fund if—

(A) The agency gives the Secretary prior notice setting forth a detailed justification for the action;

(B) The Secretary determines that such credits were made erroneously and in good faith; and

(C) The Secretary determines that the action would not unfairly prejudice other parties.

(iii) A guaranty agency shall correct any other errors in its accounting or reporting as soon as practicable after the errors become known to the agency.

(iv) If a general reconstruction of a guaranty agency's historical accounting records is necessary to make a change under paragraphs (a)(4)(ii) and (a)(4)(iii) of this section or any other retroactive change to its accounting records, the agency may make this reconstruction only upon prior approval by the Secretary and without any

deduction from its reserve fund for the cost of the reconstruction.

(5) *Investments.* The guaranty agency shall exercise the level of care required of a fiduciary charged with the duty of investing the money of others when it invests the assets of the reserve fund described in paragraph (a)(i) of this section. It may invest these assets only in low-risk securities, such as obligations issued or guaranteed by the United States or a State.

(6) *Development of assets.* (i) If the guaranty agency uses in a substantial way for purposes other than the agency's guaranty activities any funds required to be credited to the reserve fund under paragraph (a)(1) of this section or any assets derived from the reserve fund to develop an asset of any kind and does not in good faith allocate a portion of the cost of developing and maintaining the developed asset to funds other than the reserve fund, the Secretary may require the agency to—

(A) Correct this allocation under paragraph (a)(4)(iii) of this section; or

(B) Correct the recorded ownership of the asset under paragraph (a)(4)(iii) of this section so that—

(*i*) If, in a transaction with an unrelated third party, the agency sells or otherwise derives revenue from uses of the asset that are unrelated to the agency's guaranty activities, the agency promptly shall deposit into the reserve fund described in paragraph (a)(1) of this section a percentage of the sale proceeds or revenue equal to the fair percentage of the total development cost of the asset paid with the reserve fund monies or provided by assets derived from the reserve fund; or

(2) If the agency otherwise converts the assets, in whole or in part, to a use unrelated to its guaranty activities, the agency promptly shall deposit into the reserve fund described in paragraph (a)(1) of this section a fair percentage of the fair market value or, in the case of a

temporary conversion, the rental value of the portion of the asset employed for the unrelated use.

(ii) If the agency uses funds or assets described in paragraph (a)(6)(i) of this section in the manner described in that paragraph and makes a cost and maintenance allocation erroneously and in good faith, it shall correct the allocation under paragraph (a)(4)(iii) of this section.

(7) *Third-party claims.* If the guaranty agency has any claim against any other party to recover funds or other assets for the reserve fund, the claim is the property of the United States.

(8) *Related-party transactions.* All transactions between a guaranty agency and a related organization or other person that involve funds required to be credited to the agency's reserve fund under paragraph (a)(1) of this section or assets derived from the reserve fund must be on terms that are not less advantageous to the reserve fund than would have been negotiated on an arm's-length basis by unrelated parties.

(9) *Scope of definition.* The provisions of this § 682.410(a) define reserve funds and assets for purposes of sections 422 and 428 of the Act. These provisions do not, however, affect the Secretary's authority to use all funds and assets of the agency pursuant to section 428(c)(9)(F)(vi) of the Act.

(10) *Minimum reserve fund level.* The guaranty agency must maintain a current minimum reserve level of not less than—

(i) .5 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1993;

(ii) .7 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1994;

(iii) .9 percent of the amount of loans outstanding, for the fiscal year of the agency that begins in calendar year 1995; and

(iv) 1.1 percent of the amount of loans outstanding, for each fiscal year of the agency that begins on or after January 1, 1996.

(11) *Definitions.* For purposes of this section—

(i) *Reserve fund level* means—

(A) The total of reserve fund assets as defined in paragraph (a)(1) of this section;

(B) Minus the total amount of the reserve fund assets used in accordance with paragraphs (a)(2) and (a)(3) of this section; and

(ii) *Amount of loans outstanding* means—

(A) The sum of—

(*1*) The original principal amount of all loans guaranteed by the agency; and

(2) The original principal amount of any loans on which the guarantee was transferred to the agency from another guarantor, excluding loan guarantees transferred to another agency pursuant to a plan of the Secretary in response to the insolvency of the agency;

(B) Minus the original principal amount of all loans on which—

(*1*) The loan guarantee was cancelled;

(*2*) The loan guarantee was transferred to another agency;

(*3*) Payment in full has been made by the borrower;

(*4*) Reinsurance coverage has been lost and cannot be regained; and

(*5*) The agency paid claims.

(b) *Administrative requirements*—(1) *Independent audits.* The guaranty agency shall arrange for an independent financial and compliance audit of the agency's FFEL program as follows:

(i) With regard to a guaranty agency that is an agency of a State government, an audit must be conducted in accordance with 31 U.S.C. 7502 and 34 CFR part 80, appendix G.

(ii) With regard to a guaranty agency that is a nonprofit organization, an audit must be conducted in accordance with OMB Circular A-133, Audits of Institutions of Higher Education and Other Nonprofit Organizations and 34 CFR 74.61(h)(3). If a nonprofit guaranty agency meets the criteria in Circular A-133 to have a program specific audit, and chooses that option, the program specific audit must meet the following requirements:

(A) The audit must examine the agency's compliance with the Act, applicable regulations, and agreements entered into under this part.

(B) The audit must examine the agency's financial management of its FFEL program activities.

(C) The audit must be conducted in accordance with the standards for audits issued by the United States General Accounting Office's (GAO) Government Auditing Standards. Procedures for audits are contained in an audit guide developed by, and available from, the Office of the Inspector General of the Department.

(D) The audit must be conducted annually and must be submitted to the Secretary within six months of the end of the audit period. The first audit must cover the agency's activities for a period that includes July 23, 1992, unless the agency is currently submitting audits on a biennial basis, and the second year of its biennial cycle starts on or before July 23, 1992. Under these circumstances, the agency shall submit a biennial audit that in-

cludes July 23, 1992 and submit its next audit as an annual audit.

(2) *Collection charges.* Whether or not provided for in the borrower's promissory note, the guaranty agency shall charge a borrower an amount equal to reasonable costs incurred by the agency in collecting a loan on which the agency has paid a default or bankruptcy claim. These costs may include, but are not limited to, all attorney's fees, collection agency charges, and court costs. The amount charged a borrower shall equal the lesser of—

(i) The amount that would be charged for the costs of collection under the formula in 34 CFR 30.60; or

(ii) The amount the same borrower would be charged for the cost of collection if the loan was held by the U.S. Department of Education.

(3) *Interest charged by guaranty agencies.* The guaranty agency shall charge the borrower interest on the amount owed by the borrower after the capitalization required under paragraph (b)(4) of this section has occurred at a rate that is the greater of—

(i) The rate established by the terms of the borrower's original promissory note;

(ii) In the case of a loan for which a judgment has been obtained, the rate provided for by State law.

(4) *Capitalization of unpaid interest.* The guaranty agency shall capitalize any unpaid interest due the lender from the borrower at the time the agency pays a default claim to the lender.

(5) *Credit bureau reports.* (i) After the completion of the procedures in paragraph (b)(5)(ii) of this section, the guaranty agency shall, after it has paid a default claim, report promptly, but not less than sixty days after completion of the procedures in paragraph (b)(6)(iii) of this section, and on a regular basis, to all national credit bureaus—

(A) The total amount of loans made to the borrower and the remaining balance of those loans;

(B) The date of default;

(C) Information concerning collection of the loan, including the repayment status of the loan;

(D) Any changes or corrections in the information reported by the agency that result from information received after the initial report; and

(E) The date the loan is fully repaid by or on behalf of the borrower or discharged by reason of the borrower's death, bankruptcy, or total and permanent disability.

(ii) The guaranty agency, promptly after it pays a default claim on a loan but before it reports the default to a credit bureau or assesses collection costs against a borrower, shall provide the borrower with—

(A) Written notice that meets the requirements of paragraph (b)(5)(vi) of this section regarding the proposed actions;

(B) An opportunity to inspect and copy agency records pertaining to the loan obligation;

(C) An opportunity for an administrative review of the legal enforceability or past-due status of the loan obligation; and

(D) An opportunity to enter into a repayment agreement on terms satisfactory to the agency.

(iii) The procedures set forth in 34 CFR 30.20-30.33 (administrative offset) satisfy the requirements of paragraph (b)(5)(ii) of this section.

(iv)(A) In response to a request submitted by a borrower, after the deadlines established under agency rules, for access tor records, an administrative review, or for an opportunity to enter into a repayment agreement, the agency shall provide the requested relief but may con-

tinue reporting the debt to credit bureaus until it determines that the borrower has demonstrated that the loan obligation is not legally enforceable or that alternative repayment arrangements satisfactory to the agency have been made with the borrower.

(B) The deadline established by the agency for requesting administrative review under paragraph (b)(5)(ii)(C) of this section must allow the borrower at least 60 days from the date the notice described in paragraph (b)(5)(ii)(A) of this section is sent to request that review.

(v) An agency may not permit an employee, official, or agent to conduct the administrative review required under this paragraph if that individual is—

(A) Employed in an organizational component of the agency or its agent that is charged with collection of loan obligations; or

(B) Compensated on the basis of collections on loan obligations.

(vi) The notice sent by the agency under paragraph (b)(5)(ii)(A) of this section must—

(A) Advise the borrower that the agency has paid a default claim filed by the lender and has taken assignment of the loan;

(B) Identify the lender that made the loan and the school for attendance at which the loan was made;

(C) State the outstanding principal, accrued interest, and any other charges then owing on the loan;

(D) Demand that the borrower immediately begin repayment of the loan;

(E) Explain the rate of interest that will accrue on the loan, that all costs incurred to collect the loan will be charged to the borrower, the authority for assessing these

costs, and the manner in which the agency will calculate the amount of these costs;

(F) Notify the borrower that the agency will report the default to all national credit bureaus to the detriment of the borrower's credit rating;

(G) Explain the opportunities available to the borrower under agency rules to request access to the agency's records on the loan, to request an administrative review of the legal enforceability or past-due status of the loan, and to reach an agreement on repayment terms satisfactory to the agency to prevent the agency from reporting the loan as defaulted to credit bureaus and provide deadlines and method for requesting this relief;

(H) Unless the agency uses a separate notice to advise the borrower regarding other proposed enforcement actions, describe specifically any other enforcement action, such as offset against federal or state income tax refunds or wage garnishment that the agency intends to use to collect the debt, and explain the procedures available to the borrower prior to those other enforcement actions for access to records, for an administrative review, or for agreement to alternative repayment terms;

(I) Describe the grounds on which the borrower may object that the loan obligation as stated in the notice is not a legally enforceable debt owed by the borrower;

(J) Describe any appeal rights available to the borrower from an adverse decision on administrative review of the loan obligation;

(K) Describe any right to judicial review of an adverse decision by the agency regarding the legal enforceability or past-due status of the loan obligation; and

(L) Describe the collection actions that the agency may take in the future if those presently proposed do not result in repayment of the loan obligation, including the filing of a lawsuit against the borrower by the agency and

assignment of the loan to the Secretary for the filing of a lawsuit against the borrower by the Federal Government.

(6) *Collection efforts on defaulted loans.* (i) A guaranty agency shall engage in at least the collection activities described in paragraphs (b)(6) (iii) through (xii) of this section on a loan on which it pays a default claim filed by a lender, and shall attempt an annual IRS offset on each eligible loan, except that the agency may engage in the collection activities described in paragraph (b)(7) of this section in lieu of the activities described in paragraphs (b)(6) (iii) through (vi) of this section.

If, after initiating wage garnishment procedures, the agency terminates those procedures for a particular borrower, the agency shall, within 30 days, commence collection efforts at least as forceful as those described in paragraphs (b)(6) (iii) through (xii) of this section. The agency's collection efforts shall begin with the same collection activities as those that immediately preceded the initiation of garnishment procedures, or, if no collection activities had been performed, the agency shall begin with the activities described in paragraph (b)(6)(iii) of this section, except that the agency may engage in the collection activities described in paragraph (b)(7) of this section in lieu of the activities described in paragraphs (b)(6)(iii) through (vi) of this section.

(ii)(A) The periods of time set forth in paragraphs (b)(6)(iii)-(xii) and (b)(7) of this section refer to the number of days that elapse from the date the agency pays a default claim on a loan or on multiple loans for a borrower. These periods of time do not include any periods during which the agency is engaged in activities related to administrative wage garnishment, or is receiving a payment through garnishment at least once every 60 days during the period specified in paragraph (5)(iv)(B) of this section, or during which the agency is engaged in an administrative review of the borrower's indebtedness on the loan pursuant to a request by the borrower under

paragraph (b)(5)(iv) of this section. References to the "borrower" in this paragraph and paragraph (b)(7) of this section include all endorsers on a loan.

(B) The agency may institute a civil suit against the borrower earlier than the first day of the period described in paragraph (b)(6)(vii) of this section. Upon instituting suit, the agency is not required thereafter to follow the procedures in paragraphs (b)(6)(iii) or (b)(7) of this section.

(C) Upon receipt of a payment from a borrower during a period described in paragraphs (b)(6)(iii) or (iv) of this section, or, in the case of a borrower whom the agency locates through the use of a skip-tracing under paragraph (b)(6)(xii) of this section, the agency is not required to follow the specific collection efforts described in paragraphs (b)(6)(iii)-(vii) of this section if the written notice described in paragraph (b)(5)(ii) of this section has been sent but shall diligently attempt to collect the loan for 60-days following receipt of the payment or receipt of confirmation of the borrower's address as applicable. If the agency receives no payments during the 60-day period, the agency shall resume its use of the collection efforts described in paragraphs (b)(6)(iv)-(ix) of this section, treating the first day after the end of the 60-day period as the first day of the period described in paragraphs (b)(6)(iv) of this section.

(iii) One—45 days: During this period, the agency shall—

(A) Send to the borrower the written notice described in paragraph (b)(5)(ii) of this section, and a written notice stating that the agency either will initiate procedures to garnish the borrower's wages, or institute a civil suit to compel repayment of the amount that the borrower owes plus related collection costs; and

(B) Diligently attempt to contact the borrower by telephone, as defined in § 682.411(1) (with references to

"the lender" understood to mean "the agency"), to demand payment of the loan.

(iv) 46-180 days: During this period the agency shall—

(A) Engage in at least two dililgent attempts to contact the borrower by telephone, as defined in § 682.411(1) (with references to "the lender" understood to mean "the agency") to demand repayment of the loan; and

(B) Send at least three written notices to the borrower forcefully demanding that the borrower immediately commence repayment of the loan, and informing the borrower that the default has been reported to all national credit bureaus (if that is the case) and that the borrower's credit rating may thereby have been damaged. The final notice also must indicate that it is the final notice the borrower will receive before the agency will take more forceful action, including the initiation of procedures to garnish the borrower's wages, or to offset the borrower's state and federal income tax refunds, or instituting a civil suit to compel repayment of the amount that the borrower owes plus related collection costs.

(v) At no point during the periods described in paragraphs (b)(6) (iii) and (iv) of this section may the agency permit the occurrence of a gap in collection activity of more than 60 days.

(vi) For purposes of paragraph (b)(6)(v) of this section, the term *gap in collection activity* means, with respect to a loan, any period—

(A) Beginning on the date that is the day after—

(*1*) The date the agency paid a default claim to the lender thereon;

(*2*) The day on which the agency receives the correct address for a borrower who has made no payment in the preceding 60 days; or

(*3*) The day on which the agency completes a collection activity as defined in § 682.411(k) (1) through (3) (with references to "the lender" therein understood to mean "the agency"); and

(B) Ending on the date of the earliest of—

(*1*) The day on which the agency receives the first subsequent payment;

(*2*) The day on which the agency begins the first subsequent collection activity as defined in § 682.411(k) (1) through (3) (with references to the "lender" understood to mean "the agency"); or

(*3*) The last day of the period described in paragraph (b)(6)(iv) of this section.

(vii) 181-545 days:

(A) Except as provided in paragraph (b)(6)(vii)(B) of this section, during this period, but not sooner than 30 days after sending the notice described in paragraph (b)(5)(vi) of this section, the agency shall initiate proceedings to offset the borrower's state and federal income tax refunds, and shall either initiate wage garnishment proceedings against the borrower by the 225th day, or, by the 545th day, institute a civil suit against the borrower for repayment of the loan.

(B) The agency need not file suit if the agency determines and documents in the borrower's file that—

(*1*) The cost of litigation would exceed the likely recovery if litigation was begun; or

(*2*) The borrower does not have the means to satisfy a judgment on the debt or a substantial portion thereof.

(viii)(A) If as a result of a determination made pursuant to paragraph (B)(6)(vii)(D)(*2*) of this section the agency does not institute a civil suit against the borrower for repayment of the loan, the agency shall conduct

diligent semi-annual inquiries to determine if the borrower has since acquired the means to satisfy a judgment on the debt or a substantial portion thereof.

(B) If the agency determines that the borrower has acquired the means to satisfy at least a substantial portion of the debt and that the cost of litigation would not exceed the amount likely to be obtained if litigation were begun, then, if subsequent collection efforts are not successful, the agency, no later than 60 days after the determination, shall institute a civil suit against the borrower for repayment of the loan.

(C) The guaranty agency shall document in the borrower's file determinations made pursuant to this paragraph.

(ix)(A) The agency shall attempt diligently to enforce a judgment obtained against a borrower on a loan and shall ensure that the judgment is renewed as permitted by applicable law. If, despite diligent attempts, the agency cannot recover the full amount of the judgment because the borrower lacks sufficient assets or income attachable under applicable law to fully satisfy the judgment, the agency shall conduct diligent semi-annual inquiries to determine if the borrower has since acquired sufficient attachable assets or income to satisfy the remainder of the judgment.

(B) If the agency determines that the borrower has acquired sufficient attachable assets or income to satisfy the remainder of the judgment and that the cost of enforcing the judgment would not exceed the likely recovery, the agency, not later than 60 days thereafter, shall notify the borrower in writing of its intention to resume enforcement efforts on the judgment unless the borrower makes payment in full of all outstanding amounts.

(C) If the borrower does not make payment in full within 30 days of the date the agency sends the notice

described in paragraph (b)(6)(ix)(B) of this section, the agency, within 30 days thereafter, shall proceed to enforce the remainder of the judgment.

(x) The agency may discontinue conducting the semi-annual inquiries concerning a borrower's means required by paragraphs (b)(6) (viii) and (ix) of this section only in accordance with criteria and procedures approved by the Secretary.

(xi) Notwithstanding paragraphs (b)(6)(vii)-(x) of this section, the agency shall file a civil suit against the borrower for repayment of the loan, and shall enforce a judgment obtained thereon unless the agency—

(A) Determines and documents in the borrower's file that the cost of litigation would exceed the judgment amount likely to be obtained if litigation were begun, or, in the case of a proceeding to enforce a judgment, that the cost of such a proceeding would exceed the likely recovery from the debtor; or

(B) Previously has discontinued semi-annual inquiries on the debt in accordance with paragraph (b)(6)(x) of this section.

(xii) Not later than 10 days after its receipt of information indicating that it does not know the current address of a borrower on a loan on which the agency has neither declined to sue under paragraph (b)(6)(vii)(B) of this section nor discontinued semi-annual inquiries under paragraph (b)(6)(x) of this section, or the 60th day after its payment of a default claim on the loan, whichever is later, the agency shall attempt diligently to locate the borrower through the use of all available skip-tracing techniques, including, but not limited to, any skip-tracing assistance available from the IRS, credit bureaus, and state motor vehicle departments. A guaranty agency shall use any information provided by a school about a borrower's location in conducting skip-tracing activities.

(7) *Alternative collection procedures for defaulted loans.* (i) A guaranty agency may engage in the following collection activities in lieu of the activities described in paragraphs (b)(6)(iii)-(iv) of this section. The regulations in paragraphs (b)(6)(ii) (A) and (B) of this section apply to the periods of time set forth in paragraphs (b)(7)(iii)-(v) of this section.

(ii) Upon receipt of a payment from a borrower, the agency is not required to follow the specific collection efforts described in paragraphs (b)(7)(iii)-(vi) of this section but shall diligently attempt to collect the loan for 60 days following receipt of the payment. If the agency receives no payments during the 60-day period, the agency shall resume its use of the collection efforts described in paragraphs (b)(7)(iii)-(vi) of this section, treating the first day after the end of the 60-day period as the first day of the period described in paragraph (b)(7)(iv) of this section.

(iii) 1-30 days: During this period the agency shall send to the borrower the written notice described in paragraph (b)(5)(ii) of this section.

(iv)(A) 31-180 days: During this period the guaranty agency shall attempt diligently to collect the loan using such collection tools and activities as it deems appropriate, provided, however, that the agency must make at least one diligent effort to contact the borrower by telephone, as defined in § 682.411(1) (with references to "the lender" understood to mean "the agency"), and send at least two forceful collection letters to the borrower.

(B) By the end of this period, the agency shall refer the loan to a collection contractor in accordance with paragraph (b)(7)(iv)(C) of this section.

(C) The collection contractor to whom the agency refers a loan under paragraph (b)(7)(iv)(B) of this section must—

(*1*) Be compensated for its services on all FFEL loans referred by the agency solely on a contingency fee basis;

(*2*) Be one of at least two collection contractors simultaneously providing collection services to the agency on FFEL loans under a competitive system that the agency has established and that includes the periodic assessment by the agency of the performance of the competing contractors and periodic adjustments in the volume of loans referred by the agency to each competing contractor based on those assessments; and

(*3*) Not receive referral of more than 70 percent of the agency's referred loans in any calendar year.

(v) Notwithstanding the deadline for instituting a civil suit set forth in paragraph (b)(6)(vii) of this section, an agency that uses the procedures in paragraphs (b)(7)(i)-(iv) of this section shall institute a civil suit required by that paragraph prior to the earliest of—

(A) The 90th day following the collection contractor's return of the loan to the agency; or

(B) The 365th day following the later of the agency's referral of the loan to the collection contractor, or the contractor's receipt of a payment on the loan.

(8) *Special conditions for agency payment of a claim.* (i) A guaranty agency may adopt a policy under which it pays a claim to a lender on a loan under the conditions described in § 682.509(a)(1).

(ii) Upon the payment of a claim under a policy described in paragraph (b)(8)(i) of this section, the guaranty agency shall—

(A) Perform the loan servicing functions required of a lender under § 682.208, except that the agency is not required to follow the credit bureau reporting requirements of that section;

(B) Perform the functions of the lender during the repayment period of the loan, as required under § 682.209;

(C) If the borrower is delinquent in repaying the loan at the time the agency pays a claim thereon to the lender or becomes delinquent while the agency holds the loan, exercise due diligence in accordance with § 682.411 in attempting to collect the loan from the borrower and any endorser or comaker; and

(D) After the date of default on the loan, if any, comply with paragraph (b)(6)(i) of this section with respect to collection activities on the loan, with the date of default treated as the claim payment date for purposes of those paragraphs.

(9) *Preemption of State law.* The provisions of paragraphs (b) (2), (5), (6), and (7) of this section preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements of these provisions.

(10) *Administrative Garnishment.* (i) If a guaranty agency decides to garnish the disposable pay of a borrower who is not making payments on a loan held by the agency, on which the Secretary has paid a reinsurance claim, it shall do so in accordance with the following procedures:

(A) The employer shall deduct and pay to the agency from a borrower's wages an amount that does not exceed the lesser of 10 percent of the borrower's disposable pay for each pay period or the amount permitted by 15 U.S.C. 1673, unless the borrower provides the agency with written consent to deduct a greater amount. For this purpose, the term "disposable pay" means that part of the borrower's compensation from an employer remaining after the deduction of any amounts required by law to be withheld.

(B) At least 30 days before the initiation of garnishment proceedings, the guaranty agency shall mail to the borrower's last known address, a written notice of the nature and amount of the debt, the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the borrower's rights.

(C) The guaranty agency shall offer the borrower an opportunity to inspect and copy agency records related to the debt.

(D) The guaranty agency shall offer the borrower an opportunity to enter into a written repayment agreement with the agency under terms agreeable to the agency.

(E) The guaranty agency shall offer the borrower an opportunity for a hearing in accordance with paragraph (b)(10)(i)(J) of this section concerning the existence or the amount of the debt and, in the case of a borrower whose proposed repayment schedule under the garnishment order is established other than by a written agreement under paragraph (b)(10)(i)(D) of this section, the terms of the repayment schedule.

(F) The guaranty agency shall sue any employer for any amount that the employer, after receipt of the garnishment notice provided by the agency under paragraph (b)(10)(i)(H) of this section, fails to withhold from wages owed and payable to an employee under the employer's normal pay and disbursement cycle.

(G) The guaranty agency may not garnish the wages of a borrower whom it knows has been involuntarily separated from employment until the borrower has been reemployed continuously for at least 12 months.

(H) Unless the guaranty agency receives information that the agency believes justifies a delay or cancellation of the withholding order, it shall send a withholding order to the employer within 20 days after the borrower fails to make a timely request for a hearing, or, if a timely

request for a hearing is made by the borrower, within 20 days after a final decision is made by the agency to proceed with garnishment.

(I) The notice given to the employer under paragraph (b)(10)(i)(H) of this section must contain only the information as may be necessary for the employer to comply with the withholding order.

(J) The guaranty agency shall provide a hearing, which, at the borrower's option, may be oral or written, if the borrower submits a written request for a hearing on the existence or amount of the debt or the terms of the repayment schedule. The time and location of the hearing shall be established by the agency. An oral hearing may, at the borrower's option, be conducted either in-person or by telephone conference. All telephonic charges must be the responsibility of the guaranty agency.

(K) If the borrower's written request is received by the guaranty agency on or before the 15th day following the borrower's receipt of the notice described in paragraph (b)(10)(i)(B) of this section, the guaranty agency may not issue a withholding order until the borrower has been provided the requested hearing. For purposes of this paragraph, in the absence of evidence to the contrary, a borrower shall be considered to have received the notice described in paragraph (b)(10)(i)(B) of this section 5 days after it was mailed by the agency. The guaranty agency shall provide a hearing to the borrower in sufficient time to permit a decision, in accordance with the procedures that the agency may prescribe, to be rendered within 60 days.

(L) If the borrower's written request is received by the guaranty agency after the 15th day following the borrower's receipt of the notice described in paragraph (b)(10)(i)(B) of this section, the guaranty agency shall provide a hearing to the borrower in sufficient time that a decision, in accordance with the procedures that the

agency may prescribe, may be rendered within 60 days, but may not delay issuance of a withholding order unless the agency determines that the delay in filing the request was caused by factors over which the borrower had no control, or the agency receives information that the agency believes justifies a delay or cancellation of the withholding order. For purposes of this paragraph, in the absence of evidence to the contrary, a borrower shall be considered to have received the notice described in paragraph (b)(10)(i)(B) of this section 5 days after it was mailed by the agency.

(M) The hearing official appointed by the agency to conduct the hearing may be any qualified individual, including any administrative law judge, not under the supervision or control of the head of the guaranty agency.

(N) The hearing official shall issue a final written decision at the earliest practicable date, but not later than 60 days after the guaranty agency's receipt of the borrower's hearing request.

(O) As specified in section 488A(a)(8) of the HEA, the borrower may seek judicial relief, including punitive damages, if the employer discharges, refuses to employ, or takes disciplinary action against the borrower due to the issuance of a withholding order.

(ii) References to "the borrower" in this paragraph include all endorsers on a loan.

(c) *Enforcement requirements.* A guaranty agency shall take such measures and establish such controls as are necessary to ensure its vigorous enforcement of all Federal, State, and guaranty agency requirements, including agreements, applicable to its loan guarantee program, including, at a minimum, the following:

(1) Conducting comprehensive biennial on-site program reviews, using statistically valid techniques to calculate liabilities to the Secretary that each review indicates may exist, of at least—

(i)(A) Each participating lender whose dollar volume of FFEL loans made or held by the lender and guaranteed by the agency in the preceding year—

(*1*) Equaled or exceeded two percent of the total of all loans guaranteed in that year by the agency;

(*2*) Was one of the ten largest lenders whose loans were guaranteed in that year by the agency; or

(*3*) Equaled or exceeded $10 million in the most recent fiscal year;

(B) Each lender described in section 435(d)(1)(D) or (J) of the Act that is located in any State in which the agency is the principal guarantor as defined in § 682.800(d), and, at the option of each guaranty agency, the Student Loan Marketing Association; and

(C) Each participating school, located in a State for which the guaranty agency is the principal guaranty agency, that has a cohort default rate, as defined in 34 CFR 668.15, for either of the two immediately preceding fiscal years, as defined in § 668.15, that exceeds 20 percent, unless the school is under a mandate from the Secretary under §668.15 to take specific default reduction measures or if the total dollar amount of loans entering repayment in each fiscal year on which the default rate over 20 percent is based does not exceed $100,000; or

(ii) The schools and lenders selected by the agency as an alternative to the reviews required by paragraphs (c)(1)(A)-(C) of this section if the Secretary approves the agency's proposed alternative selection methodology.

(2) Demanding prompt repayment by the responsible parties to lenders, borrowers, the agency, or the Secretary, as appropriate, of all funds found in those reviews to be owed by the participants with regard to loans guaranteed by the agency, whether or not the agency holds the loans, and monitoring the implementation by participants of corrective actions, including these repayments, required by the agency as a result of those reviews.

(3) Referring to the Secretary for further enforcement action any case in which repayment of funds to the Secretary is not made in full within 60 days of the date of the agency's written demand to the school, lender, or other party for payment, together with all supporting documentation, any correspondence, and any other documentation submitted by that party regarding the repayment.

(4) Adopting procedures for identifying fraudulent loan applications.

(5) Undertaking or arranging with State or local law enforcement agencies for the prompt and thorough investigation of all allegations and indications of criminal or other programmatic misconduct by its program participants, including violations of Federal law or regulations.

(6) Promptly referring to appropriate State and local regulatory agencies and to nationally recognized accrediting agencies and associations for investigation information received by the guaranty agency that may affect the retention or renewal of the license or accreditation of a program participant.

(7) Promptly reporting all of the allegations and indications of misconduct having a substantial basis in fact, and the scope, progress, and results of the agency's investigations thereof to the Secretary.

(8) Referring appropriate cases to State or local authorities for criminal prosecution or civil litigation.

(9) Promptly notify the Secretary of—

(i) Any action it takes affecting the FFEL program eligibility of a participating lender or school;

(ii) Information it receives regarding an action affecting the FFEL program eligibility of a participating lender or school taken by a nationally recognized accrediting agency, association, or a State licensing agency;

(iii) Any judicial or administrative proceeding relating to the enforceability of FFEL loans guaranteed by the agency or in which tuition obligations of a school's students are directly at issue, other than a proceeding relating to a single borrower or student; and

(iv) Any petition for relief in bankruptcy, application for receivership, or corporate dissolution proceeding brought by or against a school or lender participating in its loan guarantee program.

(10) Cooperating with all program reviews, investigations, and audits conducted by the Secretary relating to the agency's loan guarantee program.

(11) Taking prompt action to protect the rights of borrowers and the Federal fiscal interest respecting loans that the agency has guaranteed when the agency learns that a participating school or holder of loans is experiencing problems that threaten the solvency of the school or holder, including—

(i) Conducting on-site program reviews;

(ii) Providing training and technical assistance, if appropriate;

(iii) Filing a proof of claim with a bankruptcy court for recovery of any funds due the agency and any refunds due to borrowers on FFEL loans that it has guaranteed when the agency learns that a school has filed a bankruptcy petition;

(iv) Promptly notifying the Secretary that the agency has determined that a school or holder of loans is experiencing potential solvency problems; and

(v) Promptly notifying the Secretary of the results of any actions taken by the agency to protect Federal funds involving such a school or holder.

(Approved by the Office of Management and Budget under control number 1840-0538)

(Authority: 20 U.S.C. 1078, 1078-1, 1078-2, 1078-3, 1080a, 1082, 1087, 1091a, and 1099)

[57 FR 60323, Dec. 18, 1992, as amended at 58 FR 9119, Feb. 19, 1993; 59 FR 22487, Apr. 29, 1994; 59 FR 25747. May 17, 1994; 59 FR 35625, July 13, 1994; 59 FR 60691, Nov. 25, 1994]

Section 682.413 of 34 C.F.R. provides in pertinent part:

§ 682.413. Remedial actions.

* * * *

(b) The Secretary requires a guaranty agency to repay reinsurance payments received on a loan if the lender, third-party servicer, if applicable, or the agency failed to meet the requirements of § 682.406(a).

(c)(1) In addition to requiring repayment of reinsurance payments pursuant to paragraph (b) of this section, the Secretary may take one or more of the following remedial actions against a guaranty agency or third-party servicer administering any aspect of the FFEL programs under a contract with the guaranty agency, that makes an incomplete or incorrect statement in connection with any agreement entered into under this part or violates any applicable Federal requirement:

(i) Require the agency to return payments made by the Secretary to the agency.

(ii) Withhold payments to the agency.

(iii) Limit the terms and conditions of the agency's continued participation in the FFEL programs.

(iv) Suspend or terminate agreements with the agency.

(v) Impose a fine on the agency or servicer. For purposes of assessing a fine on a third-party servicer, a repeated mechanical systemic unintentional error shall be

counted as one violation, unless the servicer has been cited for a similar violation previously and had failed to make the appropriate corrections to the system.

(vi) Require repayment from the agency and servicer pursuant to paragraph (c)(2) of this section, of interest, special allowance, and reinsurance paid on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1).

(vii) Require repayment from the agency or servicer, pursuant to paragraph (c)(2) of this section, of any related payments that the Secretary became obligated to make to others as a result of an incomplete or incorrect statement or a violation of an applicable Federal requirement.

(2) For purposes of this section, a guaranty agency and any applicable third-party servicer shall be considered jointly and severally liable for the repayment of any interest benefits, special allowance, reinsurance paid, or other compensation on Consolidation loan amounts attributed to Consolidation loans that violate § 682.206(f)(1) as a result of a violation by the servicer administering any aspect of the FFEL programs under a contract with that guaranty agency.

(3) For purposes of paragraph (c)(2) of this section, the relevant third-party servicer shall repay any outstanding liabilities under paragraph (c)(2) of this section only if—

(i) The Secretary has determined that the servicer is jointly and severally liable for the liabilities; and

(ii) (A) The guaranty agency has not repaid in full the amount of the liability within 30 days from the date the guaranty agency receives notice from the Secretary of the liability;

(B) The guaranty agency has not made other satisfactory arrangements to pay the amount of the liability

within 30 days from the date the guaranty agency receives notice from the Secretary of the liability; or

(C) The Secretary is unable to collect the liability from the guaranty agency by offsetting the guaranty agency's first reinsurance claim to the Secretary, if—

(*1*) The claim is submitted after the 30-day period specified in paragraph (c)(3)(ii)(A) of this section has passed; and

(*2*) The guaranty agency has not paid, or made satisfactory arrangements to pay, the liabiltiy.

* * * *

(e)(2)(i) The Secretary may withhold payments from an agency or suspend an agreement with an agency prior to giving notice and an opportunity to be heard if the Secretary finds that emergency action is necessary to prevent substantial harm to Federal interests.

APPENDIX E

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

September 12, 1996

Samuel D. Walker
Wiley, Rein and Fielding
1776 K Street, N.W.
Washington, DC 20006

Re: *April Brannan v. United Student Aid Funds, Inc.*
No. 93-35555 (9th Cir. August 30, 1996)

Dear Mr. Walker:

We write to express the Department's concern about the ruling of the Ninth Circuit Court of Appeals in this case that United Student Aid Funds (USA Funds) is subject to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (FDCPA). For the reasons explained here, the Department believes this ruling to be incorrect, and to undermine the Federal objective so articulately appreciated in the companion ruling that Department regulations mandating specific collection actions on defaulted Guaranteed Student Loans (GSLs) preempt State laws such as the Oregon Unfair Debt Collection Practices Act. The ruling that USA Funds is subject to the FDCPA appears to rest on a misreading of a Departmental statement but more importantly directly conflicts with the longstanding views of the Federal Trade Commission and the Department that, for reasons not addressed in the decision, the FDCPA does not apply to guarantors. It does not appear that either Federal agency's views on this issue were presented to the court. Because we believe these views are valuable for the court's consideration, and because the Department is concerned that this ruling would undermine the Federal objective, recognized by the court, that a uniform minimum national

collection process be followed to collect defaulted student loans, we offer the following comments to support a request for rehearing on this issue.

In this decision, the court considered at length a 1990 interpretation by the Department of the preemptive effect of its regulations on State laws regulating debt collection activities. Notice of Interpretation ("Interpretation"), 55 Fed. Reg. 40120, October 10, 1990. Department regulations required guaranty agencies participating in the Federal Family Education Loan Programs (then called the Guaranteed Student Loan Programs) to perform a series of actions to collect defaulted GSLs on which the Department had paid reinsurance claims.[1] Claims by borrowers that State debt collection laws prevented lenders, guarantors, and their "third party collection contractors" from performing some of these collection actions prompted the Department to issue this interpretation of its regulations. 55 Fed. Reg. 40121. The Department's regulations at that time did not expressly preempt such State laws, but the Interpretation articulated the Department's understanding that the regulations nevertheless preempted State law.[2] The Interpretation, as pertinent to the FDCPA coverage issue, stated that

> A great deal of the collection action on GSL Program loans is performed *for guaranty agencies by third party collection contractors* . . . the Secretary took particular note of the existence of Federal law that regulated the conduct *of these third party collectors of defaulted student loans. These debt col-*

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[1] The Interpretation also addressed the effect of State laws on collection duties imposed by regulations on lenders, but the applicability of the FDCPA to those activities turns on different considerations than its application to guaranty agency collection actions.

[2] The Department amended these regulations on December 18, 1992 to expressly preempt these State laws. 34 C.F.R. § 682.410 (b) (9), 57 Fed. Reg. 60358, Dec. 18, 1992.

> *lectors were subject to the Fair Debt Collection Practices Act*, ... and even under these pre-empting regulations *they* remain subject to the FDCPA. . . .

(emphasis added) 55 Fed. Reg. 40121. The words "they" and "these debt collectors" here refer to contractors described in the preceding sentences that are retained by the guarantors to collect on their behalf, and not to the guaranty agencies themselves. The Department neither stated nor implied that the guaranty agencies themselves were subject to the FDCPA when acting directly to collect defaulted student loans.[3] To the contrary, the Department used the term "third party debt collectors" in this paragraph of the Interpretation to refer to these "collection contractors" acting *for* the guaranty agencies, because the term "third party debt collector" has long been used in discussions of the FDCPA to describe those entities that collected debts owed to others and that were subject to the FDCPA, in contrast to creditors themselves, parties to whom the debt was actually owed, which were specifically excluded from coverage under the FDCPA. *See, e.g.*, S. Rep. No. 382, 95th Cong. 2d Sess. 2 (1977) Because the guaranty agencies took assignment of defaulted loans on which they had paid guarantee claims and thereafter collected these loans in their own name and to protect the financial interests of their own guarantee programs, they were properly considered to be the actual creditors to whom the defaulted loans were owed As creditors collecting in their own name, therefore, guaranty agencies were not subject to the FDCPA. 15 U.S.C. § 1692a(4).[4]

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[3] Guaranty agencies may also perform billing services on student loans they do not hold, and issue repayment demands on behalf of lenders for delinquent loans guaranteed by the agency but still held by the lenders. Those activities are not at issue here.

[4] The Department is owed a share of any recovery by the guarantor on a defaulted loan on which the Department has paid reinsur-

The Federal Trade Commission, the agency charged with administrative enforcement authority under the FDCPA, has for years agreed that guaranty agencies are not subject to the FDCPA when collecting defaulted loans on which they had paid guarantee claims. The FTC's Division of Credit Practices directly addressed this issue in a September 12, 1988 response to complaints about the activity of the Great Lakes Higher Education Corporation (GLHEC), another guaranty agency which, like USA Funds, is a non-profit organization:

> In purchasing these defaulted obligations, GLHEC legally becomes the owner of the debts. When GLHEC tries to collect these obligations, GLHEC acts as a creditor collecting its own debt in its own name and is therefore exempt from the definition of debt collector under Section 803(6)(A) of the Act.

September 12, 1988 letter from Cynthia Lamb, FTC Division of Credit Practices to Louise G. Trubek, Center for Public Representation (Enclosure 1). A year later, the Department confirmed that this FTC position remained "authoritative guidance" on this issue. *See*: September 8, 1989 letter from Saul Moskowitz, Chief, Guaranteed Student Loan Branch, to Cynthia S. Lamb, Division of Credit Practices (Enclosure 2). We know of no

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ance, 20 U.S.C. § 1078(c)(2)(D), (6), and the guaranty agency in collecting the loan promotes the Department's interests. However, the guarantor bears part of the loss in payment of a default claim, and that portion increases as the default rate on its loans increases and Federal reinsurance coverage decreases. 20 U.S.C. § 1078(c)(1)(B), *Dumas v. Kipp*, 90 F.3d 386, 389 (9th Cir. 1996). Regardless of the how one characterizes the guarantor's role *vis a vis* the Department in collecting the loan, the guarantor collects to enforce its own distinct financial interests as well as those of the Department. Thus, although the guarantor does take assignment of debts in default, it does not do so "solely for the purpose of facilitating collection for" the Department, 15 U.S.C. § 1692a(4), and therefore falls within the FDCPA definition of creditor as opposed to debt collector.

change since that time in the FTC's views; the Department relied on this understanding both in numerous informal responses to inquiries on this issue, and in framing the statements in the Interpretation at issue here.

The practical effect of the ruling may be very detrimental to the "minimum standard of collection action" prescribed by the Department. If guarantors are subject to the FDCPA, they would not pursue those prescribed collection actions where to do so would be prohibited or penalized by that Act. The FDCPA for example, would bar guarantors from direct contact with debtors represented by counsel, and would prohibit continued attempts to persuade borrowers to resume repayment after demands that contact cease. The FDCPA would further require guarantors to include technical "warning" language and debt validation notices in written communications with the debtor, provisions that would be confusing, superfluous and even contradict the highly developed disclosure and notice requirements in the Higher Education Act and Department regulations. These restrictions, accompanied by the risk of substantial penalties for even technical violations, could only tend to deter guarantor compliance with the collection process already established by the Department. Moreover, guarantors, which are either State agencies or non-profits whose recoveries are dedicated to loan program purposes, lack the kind of financial incentives for abusive collection practices that the FDCPA is designed to prevent.

For these reasons, we urge USA Funds to present these positions to the court. Thank you for your consideration.

Sincerely,

/s/ Fred J. Marinucci
FRED J. MARINUCCI
Deputy Asst. General Counsel
for Postsecondary Education

Enclosures

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

September 12, 1988

Ms. Louise G. Trubek
Executive Director
Center for Public Representation
520 University Avenue
Madison, Wisconsin 53703

Dear Ms. Trubek:

This is in response to your recent letter addressed to Jean Noonan. Ms. Noonan has asked me to respond to your inquiry. I apologize for the delay. The answer to your questions involved a considerable amount of research.

Your letter concerns the collection practices of the Wisconsin Higher Education Association, now known as Great Lakes Higher Education Corporation (GLHEC). You allege that GLHEC has been negligent in informing borrowers of deferments and forbearances to which they are entitled. In addition, you allege that GLHEC's collection practices have violated the Fair Debt Collection Practices Act (FDCPA).

First, I must address the question of whether Great Lakes Higher Education Corporation is covered by the Act (copy enclosed). It is my understanding that GLHEC has two separate operating units. One unit services student loans for commercial lending institutions. The other unit guarantees the loans by taking assignments for value after default. In order to violate the Act GHLEC must be covered by its provisions. Coverage is predicated on the definition of "debt collector" in Section 803(6). Regarding the servicing of loans, Section 803(6)(F)(iii)

excludes from the definition any person collecting a debt owed to another party to the extent that the collection activity concerns a debt which was not in default at the time it was obtained. Additionally, in the legislative history of the FDCPA, Congress specified that the term debt collector is "not intended to include . . . mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing." [1] In its capacity as a servicing organization, GHLEC handles a student loan well in advance of any default on the loan; therefore, in this capacity, as a servicing organization, GLHEC is not covered by the FDCPA.

Next, let me address the question of Great Lakes Higher Education Corporation's activities in collecting debts in its capacity as a guarantor of student loans. In this capacity GLHEC purchases student loans which are in default status from commercial lending institutions. In purchasing these defaulted obligations, GLHEC legally becomes the owner of the debts. When GLHEC tries to collect these obligations, GLHEC acts as a creditor collecting its own debt in its own name and is therefore exempt from the definition of debt collector under Section 803(6)(A) of the Act. Therefore, it appears that GLHEC is not a "debt collector" for purposes of the Act and an investigation for violations of the Act is not warranted.

Many of the consumer complaints you enclosed involve the question of when deferments and forbearances are available to holders of guaranteed student loans. This question is answered in the Higher Education Act which is administered by the Department of Education. Therefore, I have taken the liberty of forwarding your letter to that agency for its determination of whether deferments and forbearances are being properly handled by GLHEC.

---

[1] S. Rep. No. 95-382, 95th Cong. 1st Sess. 3-4, *reprinted in* 1977 U.S. Code Cong. and Ad News 1698.

Thank you for your interest in writing to us.

Yours truly,

/s/ Cynthia S. Lamb
CYNTHIA S. LAMB
Investigator
Division of Credit Practices

Enclosure

[Sep. 8, 1989]

Ms. Cynthia S. Lamb
Investigator
Division of Credit Practices
Bureau of Consumer Protection
Federal Trade Commission (FTC)
Washington, D.C. 20589

Dear Ms. Lamb:

This letter is to confirm the conversation between you and Patsy Beavan of my staff regarding your letter of September 12, 1988 to Louise Trubek, Executive Director, Center for Public Representation, in response to questions involving the collection practices of the Great Lakes Higher Education C rporation.

Ms. Beavan inquired as to whether the Department could use this letter as authoritative guidance from the FTC staff in responding to guarantee agencies' inquiries relative to this issue. It is our understanding that this letter has been reviewed by the appropriate officials within the staff of the Federal Trade Commission and may be used in issuing guidance regarding the applicability of the Fair Debt Collection Practices Act in the circumstances outlined therein. You indicated that inquiries as to other circumstances should be submitted directly to the FTC.

It is also our understanding that the term "default" as used in that letter with regard to Guaranteed Student Loans has the meaning found in the definition of "default" set forth in 34 CFR 682.200.

Please contact me or Ms. Beavan if this letter does not accurately affect the position of the FTC staff on this issue.

Sincerely,

SAUL MOSKOWITZ
Chief
Guaranteed Student Loan Branch
Division of Policy
and Program Development

APPENDIX F

DEPARTMENT OF EDUCATION

34 CFR Part 682

RIN 1840-AC35

Federal Family Education Loan Program; Due Diligence Requirements

AGENCY: Department of Education.

ACTION: Final regulations.

[61 Fed. Reg. 60,478, 60,484-85 (Nov. 27, 1996)]

* * * *

Comment: One commenter asked the Secretary to address the issue of whether the Federal Fair Debt Collection Practices Act (FDCPA) applies to guaranty agency collection activities on defaulted loans.

Discussion: It has been the longstanding view of the Secretary and the Federal Trade Commission that the FDCPA does not apply to guaranty agencies collecting defaulted FFEL Program loans in their own names and protecting the financial interests of their guarantee programs. The FDCPA does not apply to an entity collecting a debt it is owed. Moreover, application of the FDCPA to the guaranty agencies would potentially penalize them for compliance with the requirements in 34 CFR 682.410 and, thus, is inconsistent with the Secretary's goal of ensuring a minimum standard of collection action. The Secretary notes, however, that the FDCPA clearly applies to a collection contractor acting for the guaranty agency. Such contractors are collecting a debt owed to another and are clearly subject to the FDCPA.

Change: None.

Supreme Court, U.S.
FILED
MAY 28 1997
CLERK

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No. 96-1210

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

APRIL BRANNAN,
Respondent.

On Petition for a Writ of Certiorari to the United States of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSTION

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QUESTION PRESENTED

Whether a nonprofit corporation contracting with the Federeal Government to, among other things, collect defaulted student loans, should be treated as a governmental entity exempt from the consumer protections provided in the Federal Fair Debt Collection Practices Act. 15 USC 1692 et seq. (FDCPA)

PARTIES TO THE PROCEEDING

The Petitioner is United Student Aid Funds, Inc. ("USA Funds").

The Respondent is April Brannan.

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OPINIONS BELOW

District Court

The District Court rendered Summary Judgment in favor of USA Funds on April Brannan's (Brannan) FDCPA claim finding that congress did not intend the FDCPA to apply to nonprofit corporations contracting with the Department of Education (DOE) to

provide various services including the collection of debts for the DOE. (Petitioner (Pet.) Appendix (App.) B). The District Court cited Games v. Cavazos, 737 F Supp 1368 (Del 1990) in support of its position that USA Funds was, in effect, "a government actor." However, Games dealt only with a tax intercept letter the content of which was not subject to any discretion by the collector, Games at 1387, and involved "no allegations of abusive or harassing activities, Games at 1388.

Court of Appeals

The Court of Appeals reversed the District Court with regard to the FDCPA claim. (Pet. App. A) The Court of Appeals found that:

1. "The FDCPA does not provide an exemption for guaranty agencies that acquire a student loan after a default in order to pursue its collection." (Pet. App. 4a);

2. "The Secretary of Education has also explicitly stated that GSL third party collectors and their collection activity remain subject to the FDCPA, 55 Fed Reg 40120, 40121 (1990)," (Pet. App. 4a) and;

3. "USA Funds is not a governmental actor exempt from the FDCPA under 15 USC 1692a(6)(C).... This exemption applies only to an individual government official or employee who collects debts as part of his governmental employment responsibility. USA Funds is a private nonprofit corporation with a government contract. It is not a government agency or employee." (Pet. App. 4a-5a).

STATEMENT OF THE CASE

The relevant facts are as set forth in the opinion of the Court of Appeals (Pet. App. at 2a-3a). In summary, those facts are as follows:

1. Brannan obtained a student loan under the former Guaranteed Student Loan (GSL) program established by the Higher Education Act, 20 USC 1071 et seq. (hereinafter "HEA"). USA Funds, a private guaranty agency subject to the HEA and applicable regulations, pursuant to its contracts with the United States Department of Education, guaranteed the loan. The Department of Education, in turn, insured the guaranty agency.

2. Plaintiff received her loan from the Bank of Horton in order to attend Edison Technical College. (Pet. App. 22a) After default by Brannan, and pursuant to its contract with Bank of Horton, USA Funds paid off the loan and began its own collection activity.

3. Brannan filed suit alleging that USA Funds violated the FDCPA by threatening to cause her to lose her job, by communicating with third parties about the debt, and by refusing to communicate about the debt through her attorney.

Additional Relevant Facts Include:

4. USA Funds receives money under its contract with the DOE to provide the services enumerated in the contract.

5. For each of the alleged violations of the FDCPA, USA Funds employed discretion in its written and verbal debt collection communications with Brannan.

6. The regulatory scheme governing USA Funds' student loan collection activity requires only a minimum schedule of contacts, "due diligence" in collection activities, and a generalized requirement to communicate to the debtor the importance of repayment. (Pet. App. 70a - 83a)

7. USA Funds claims that, although it is organized as a nonprofit corporation, it is itself a government actor. USA Funds claims, in effect, a right to engage in various abusive collection techniques otherwise proscribed by the FDCPA because its status as a governmental entity exempts it from the protections provided to consumers under that Act. 15 USC 1692a(6)(c).

REASONS FOR DENYING THE WRIT

Petitioner has failed to establish a compelling basis for this court's review.

1. Petitioner has failed to establish any reviewable conflict between the FDCPA and the HEA. No such conflict exists. Each act promotes important governmental purposes. Each Act must be complied with. Preservation Coalition, Inc. vs. Pierce, 667 F2nd 851, 859 (9th Cir, 1982). That regulations adopted by the DOE pursuant to the HEA are allegedly in conflict with the FDCPA is of no moment. It is axiomatic that a regulation which is contrary to law cannot be enforced. This is true whether the conflict exists between the regulation and another Federal Act, or the Constitution of the United States. Assuming that there is a conflict as a result of the

adoption to the DOE regulation, either the regulation is not enforceable, or Congress must attend to the issue to resolve any perceived or actual conflict.[1]

2. Petitioner has failed to establish any reliable or even supportable basis for its position that the public fisc will be harmed unless USA Funds and other similar entities can engage in abusive or harassing collection activities which violate the FDCPA. Any such potential harm is speculative, the correction of which is a legislative matter. The record is utterly devoid of any facts which would establish that nonabusive collection activities would impact in any way upon the public fisc or the student loan program.

3. No substantial conflict warranting review exists between the DOE regulations and the FDCPA. Petitioner exaggerates[2] and misrepresents the language of

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[1] Congress has taken steps in other areas where conflict between agencies is a natural consequence of the activities of the various agencies. For example, in the environmental arena, the court found in, The Defenders of Wildlife vs Administrator, EPA, 882 F2nd 1294, 1299 (8th Cir 1989), that "Congress has made a conscious decision to give endangered species priority over the 'primary missions' of Federal Agencies." (Citation omitted). Therefore the Environmental Protection Agency (EPA) was required to comply with the Endangered Species Act (ESA) when evaluating the use of a pesticide regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under FIFRA, the EPA must approve an application for registration of a pesticide. In the case at bar, if regulations relating to the collection of student loans by governmental contractors is an issue of such gravity that protection of the FDCPA must be overridden, it is for the legislature to do so, not the courts.

[2] The enumerated conflicts are exaggerated (Pet. at 15-16):

A. Contact with Debtor: Nothing in the DOE regulations prohibits contact with the debtor or the debtor's guardian 15 USC 1692c(d), attorney, or other authorized representative. With permission of the debtor, the FDCPA allows contact with any Third Party. 15 USC 1692c(2). Nothing prohibits such contact at specified intervals unless the debtor notifies the collector in writing to cease further communication. Even then, some communication is allowed. 15 USC 1692c(C).

B. Locating the Debtor: Diligent effort to locate the debtor through an employer is allowed, and repeated contact is allowed where the information previously received is reasonably believed to be erroneous or incomplete, and that person contacted now has completed or corrected location information. 15 USC 1692b(3). No policy

the regulations in an apparent attempt to create conflicts that do not, in reality, exist. Two examples of misrepresentations are:

(1) The representation that the regulations require "direct" communication with borrowers that is prohibited by the FDCPA prohibits. (Pet. at 15). Petitioner cites only the opinion of the District Court with regard to the use of the word "direct". This is a misrepresentation of the language of the regulations. In fact, there is no use in the regulations of the word "direct" in relation to these communications.

(2) The representation that "the HEA regulations require that an agency inform a borrower soon after default that it 'will' pursue civil suit if repayment is not forthcoming." (Emphasis Added) (Pet. at 16). However, review of the regulatory provisions cited by Petitioner, (Pet. App. 67a, 69a-70a), require only that the word "may" is to be used in informing the debtor that civil suit is a potential outcome of the collection activity.

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should encourage repeated Third Party contact without some basis for believing it would lead to additional information.

C. Garnishment: While the FDCPA allows post judgment contact with Third Parties to serve process or effectuate a judicial remedy, 15 USC 1692a(6)(D) and c(b), the non-judicial garnishment may technically conflict with the FDCPA if done by USA Funds. This minor point arises out of recent regulations which ought to have considered potential conflicts. The matter is easily remedied. The DOE may issue the garnishments just as the IRS issues tax intercepts. Alternatively, the matter might be considered by the legislature.

D. Due Diligence: The use of this term carries with it no substance. (Pet. App 70a to 83a). It is an intangible. Its use is similar to a demand that a mechanic meet deadlines, or the urging of a child to "play hard." The actual content of the work or play is left to the actor. In requiring due diligence from its contractor, the DOE does little more than direct when contact with a debtor should occur.

No amount of rewording or exaggeration of harms should allow an interpretation of the DOE regulations to be read to allow tortious conduct, or allow an unelected body to threaten social, physical, or economic harm beyond what can and will legitimately occur through the collection process.

4. No compelling basis has been raised for dimming the bright line between the government and its functions, and contracting private corporations and their functions. This line was clarified by the decision of the Court of Appeals when it refused to give USA Funds government standing. In this case, to give the Petitioner governmental status would be to render that corporation without accountability for its actions (there is no private right of action under the HEA (Pet. at 21)). USA Funds used discretion in each of its verbal and written communications with Brannan. It uses discretion in virtually all of its communications relating to debt collection. USA Funds is not subject to due process nor equal protection requirements. It would be a mistake for this court to expand the area of interplay between government and private business through the medium of the fiction of a "government actor."[3]

5. The DOE and Fair Trade Commission, in the communications cited by, Petitioner, contend only that the FDCPA does not apply to guaranty agencies collecting student loans in their "own names." This dispute concerns whether a GSL guaranty agency which is paid to collect a debt for the Secretary of the DOE after a post default

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[3] A contractor is a contractor. This court has determined that under some circumstances, a contractor may have qualified immunity from state tort claims. Boyle v. United Technologies Corp., 487 US 500, 101 2nd Ed 442, 108 S Ct 2510 (1985). However, this Petition does not involve state claims, nor does it involve the type of government control over the contractor, and awareness of product faults required under such a theory.

acquisition of the debt, is collecting its own debt. This issue is not appropriate for review because it is:

(1) Fact intensive because the circumstances of the loan may affect the conclusion; and,

(2) Is an issue that has not been developed by the lower courts.

6. Regarding the applicability of the FDCPA to guaranty agencies there is no conflict with the 9th Circuit Opinion and any other Circuit Court of Appeals. Further, there is no conflict between the 9th Circuit Opinion and a decision by the highest court of any state.[4] In the absence of such conflict, Supreme Court review is unwarranted.

7. In construing that FDCPA, the Court of Appeals held that "where a statute (15 USC 1692a(6)(C)) names the parties that come within its provisions, other unnamed parties are excluded," (citations omitted) (Pet. App. at 4a). No private contractor is named in the exclusion, only government officers and employees of the United States or any State are named. Although USA Funds urges the court to treat it like a State, it simply is not a political body.[5]

In this case, both the HEA and FDCPA have been amended and modified on numerous occasions. (Pet. at 5) Even the exemption provision of the FDCPA has been amended, but never to include as an exempt entity contractors with the government who

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[4] In the case cited by the Petitioner Fisher v. Unipac Service Corp., 519 NW 2nd 793 (Iowa 1994), the Iowa Supreme Court relied on the applicability of the FDCPA to a company which gained an interest in a debt prior to the debt being in default. Based on that fact, the Court found that the FDCPA did not apply. Fisher at 799.

[5] The term "State means any State, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing." 15 USC 1692a(8).

collect on student loans.[6] Petitioner provides no substantial challenge to the statutory construction employed by the Court of Appeals resulting in the reversal of the District Court decision. The further interpretation of the intent of the Legislature is not appropriate for review.

8. The arguement that USA Funds is a "creditor" not subject to the FDCPA under 15 USC 1692a(4) (Pet. at 23) was not properly raised below, and is not appropriate for review.[7]

CONCLUSION

United Student Student Aid Funds, Inc.'s Petition for a Writ of Certiorari should be denied.

DATED this 28th day of May, 1997.

Respectfully Submitted,

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[6] Public law 99-361, 100 stat. 768 (July 9, 1986) repealed the provision in 15 USC 1692a(6)(f) which provided a limited exemption for attorneys.

[7] "USA Funds concedes for the purposes of this appeal that it is a 'debt collector' under 15 USC 1692a(6)." (Opinion of Court of Appeals, Pet. App 4a).

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No. 96-1210

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BRIEF OF *AMICUS CURIAE* NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. IN SUPPORT OF UNITED STUDENT AID FUNDS, INC.'S PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The National Council of Higher Education Loan Programs ("NCHELP") is a nationwide network of state and private nonprofit guaranty agencies, secondary markets, lenders, loan servicers and other organizations involved with guaranteed student loans for postsecondary education under the Federal Family Education Loan ("FFEL") program.[2]

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[1] Letters from the parties consenting to the filing of this *amicus curiae* brief have been filed with the Clerk of Court in accordance with Supreme Court Rule 37.2 (a) (1996).

[2] Petitioner United Student Aid Funds, Inc. ("USA Funds") is a member of NCHELP.

NCHELP was founded in 1962, incorporated in 1982, and currently has 151 organizational members throughout all fifty states.

NCHELP's guarantor members are either State or private nonprofit guaranty agencies, the only two entities who can fulfill the role of guarantor under the Higher Education Act of 1965, 20 U.S.C. §§ 1001 *et seq.* (1994) ("HEA"), and its implementing regulations. Our guarantor members — whether by direction of state legislatures or their nonprofit founders — carry out the mission of helping our nation's youth obtain education beyond the high school level.

The FFEL program is the nation's single largest source of financial aid for students seeking that education. Over the past 30 years, lenders participating in the FFEL program have directed approximately $200 billion in private capital to more than 75 million students and their parents, enabling financing for vocational, college, graduate, and professional education and training.[3] Many of these loans were guaranteed by NCHELP's guarantor members. According to January 1997 statistics maintained by the United States Department of Education (the "Department"), in Fiscal Year 1996 alone NCHELP's members guaranteed in excess of 5,300,000 loans valued at almost $20 billion.[4] Our members thus play a pivotal role in the administration and implementation of this important national program.

NCHELP is committed to the integrity and continued viability of the FFEL program. NCHELP's guarantor members support these goals by performing "due diligence" activities mandated by HEA and its implementing

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[3] *See* United States Department of Education, Office of Postsecondary Education, at 10 Loan Volume Update, Federal Family Education Loan Program, Fiscal Year 1996 (Jan. 1997).

[4] *Id.* at 6.

regulations in regard to the collection of defaulted student loans. As the Department itself has recognized, these "due diligence" activities are critical to the success of the FFEL program because they reduce the overall loan default rate, and ensure the availability of financial assistance for all students who need it to pursue postsecondary education. *See, e.g.*, 55 Fed. Reg. 40,120 (Oct. 1, 1990).

Recent statistics from the Department confirm the efficacy of these activities: "[f]or the third consecutive year, the rate of student loan defaults has reached an all-time low." United States Department of Education, Report to the President on Student Loan Default Initiative, at 1 (Jan. 9, 1997) (hereafter "Report to the President") Indeed, the amount of defaulted student loan collections by the federal government and guaranty agencies more than doubled from $1 billion in Fiscal Year 1992 to $2.2 billion in Fiscal Year 1996. As a result, net default costs decreased over 85% during that same period, from $1.7 billion in Fiscal Year 1992 to $249 million in Fiscal Year 1996. *Id.* at 3-4.

The Ninth Circuit ruling from which review is sought poses a fundamental threat to these salutary purposes. In this case, respondent Brannan seeks to ascribe monetary liability under the federal Fair Debt Collection Practices Act ("FDCPA") apparently based on some of the very "due diligence" activities *required* of guarantors by HEA and its implementing regulations. Although the district court agreed with petitioner USA Funds that the FDCPA did not apply to this kind of activity when undertaken by a guaranty agency, the Ninth Circuit reversed, concluding that respondent Brannan stated a claim for alleged violations of the FDCPA.

Accordingly, this case presents an important question concerning the interpretation of two federal statutes that, if simultaneously applicable, impose inconsistent and

conflicting legal obligations on nonprofit guaranty agencies.[5] NCHELP believes that if the Ninth Circuit's decision escapes review, and the inconsistent legal obligations of HEA and the FDCPA continue to be simultaneously applicable, then nonprofit guaranty agencies will be hampered in their efforts to administer the millions of individual loans outstanding in this multi-billion dollar federal program.

NCHELP agrees with petitioner USA Funds that Congress did not intend for the FDCPA to apply to private nonprofit guaranty agencies. Pursuant to Supreme Court Rule 37.1, it is not our purpose to restate those arguments. Rather, we appear as an *amicus curiae* to address, from the unique perspective of our collective membership, the serious practical disruptions arising from the Ninth Circuit's conclusion that the FDCPA's restrictions are applicable to nonprofit guaranty agencies. Regardless of whether the Court is ultimately persuaded that the Ninth Circuit's conclusion was erroneous, the uncertainty created by this decision — and the adverse impact it has had on the administration of the FFEL program generally — necessitates review by this Court.

REASONS FOR GRANTING THE WRIT

The question presented by this case is whether a nonprofit student loan guaranty agency, bound to follow the collection mandates of HEA, may be subject to civil liability under the FDCPA for following those very collection mandates.

The Ninth Circuit's answer to that question is: (1) contrary to the conclusion reached by the majority of courts

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[5] The subject ruling does not purport to reach State guaranty agencies, which continue appropriately to be immune from civil actions under the FDCPA.

that have considered this issue (including one state supreme court);[6] (2) inconsistent with the understanding of the two federal agencies charged with administering HEA and the FDCPA;[7] and (3) based on a fundamental misunderstanding of the FDCPA.[8] In any event, the Ninth Circuit's decision has created an irreconcilable conflict between HEA and the FDCPA, and simultaneously has injected uncertainty and instability into the administration of this important national program. This uncertainty, moreover, has left nonprofit guaranty agencies to speculate over their rights, obligations and liabilities under these statutes, and has hindered the ability of nonprofit guaranty agencies to carry out their normal day-to-day operations. Accordingly, it is essential that this Court resolve these conflicts without delay.

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[6] *See Fischer v. Unipac Service Corp.*, 519 N.W.2d 793, 801 (Iowa 1994); *Games v. Cavazos*, 737 F. Supp. 1368, 1388 (D. Del. 1990); *Edler v. Student Loan Marketing Ass'n*, No. 92-1619, 1993 WL 652270 at *2 (D.D.C. Dec. 13, 1993); *Leerssen v. United Student Aid Funds, Inc.*, No. 94 CV 4868 (Colo. Dist. Ct. Sept. 21, 1995). *But see Student Loan Fund of Idaho v. Duerner*, No. CV-OC-95-02576*D (Idaho Dist. Ct. Apr. 6, 1996), *review pending*, No. 23262 (Idaho).

[7] *See* Appendix to Petition for a Writ of Certiorari, United Student Aid Funds, Inc., No. 96-1210, at 88a-95a (filed Jan. 29, 1997) (hereafter "Petitioner's Appendix").

[8] *See* Petition for a Writ of Certiorari, United States Aid Funds, Inc., No. 96-1210, at 20 (filed Jan. 29, 1997) (hereafter "Petition") (discussing S. Rep. No. 382, at 2, 95th Cong. 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (noting that the purpose of the FDCPA was to respond to "debt collection abuse by third party debt collectors")).

I. THE APPLICATION OF THE FAIR DEBT COLLECTION PRACTICES ACT TO PRIVATE NONPROFIT GUARANTY AGENCIES HAS CREATED INCONSISTENT LEGAL OBLIGATIONS AND ADVERSELY IMPACTED THE ORDERLY ADMINISTRATION OF AN IMPORTANT FEDERAL PROGRAM.

The Ninth Circuit's conclusion that the FDCPA applies to private nonprofit guaranty agencies has created conflicting mandates for nonprofit guaranty agencies.

As a condition of maintaining compliance with HEA and thereby obtaining reinsurance payments from the Secretary — which are critical to the operation of the FFEL program — the Department's regulations require guaranty agencies to undertake certain affirmative "due diligence" activities in connection with the collection of defaulted loans. *See* 34 C.F.R. § 682.406(a)(11) (1996) ("A guaranty agency is entitled to reinsurance payments on a loan only if . . . [t]he agency exercised due diligence in collection of the loan in accordance with [34 C.F.R.] § 682.410(b)(6) or (7).").

The FDCPA, however, places certain restrictions on the activities of "debt collectors." Under the FDCPA, nonprofit guaranty agencies would be prohibited from engaging in some of the very activities that HEA requires.[9] If HEA and the FDCPA were to apply to nonprofit FFEL guarantors,

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[9] As USA Funds' petition for certiorari demonstrates, Congress, in defining the term "debt collector," did not intend to include nonprofit guaranty agencies, and, *a fortiori*, did not intend to impose on nonprofit guaranty agencies any conflicting statutory obligations. *See* Petition at 19-21 (explaining that nonprofit guaranty agencies are not "debt collectors" under the FDCPA, and that the legislative history of the FDCPA confirms that Congress did not intend for it to apply to nonprofit guaranty agencies). Nevertheless, the Ninth Circuit determined USA Funds was a "debt collector" subject to the FDCPA.

then compliance with the former statutory scheme would raise the specter of monetary liability under the latter.

Examples of the inconsistent obligations resulting from the Ninth Circuit's ruling include the following:

- HEA regulations require guaranty agencies to communicate with the borrower at certain time intervals, 34 C.F.R. §§ 682.410(b)(6)(iii)-(ix), while the FDCPA requires that a debt collector terminate communications at the borrower's request, 15 U.S.C. § 1692c(c);
- HEA regulations require nonprofit guaranty agencies to communicate directly with borrowers, 34 C.F.R. § 682.410(b)(6)(iii), while the FDCPA prohibits such contact once the borrower retains counsel, 15 U.S.C. § 1692c(a)(2);
- HEA regulations require nonprofit guaranty agencies to attempt diligently to find a borrower whose location is unknown, 34 C.F.R. § 682.410(b)(6)(xii), while the FDCPA generally prohibits more than one contact with a third party for this purpose (unless the initial information received was incorrect and correct information is now available), 15 U.S.C. § 1692b(3); and
- HEA regulations require nonprofit guaranty agencies to inform a borrower shortly after default of the possibility of civil litigation in the event of nonpayment, 34 C.F.R. §§ 682.410 (b)(5)(ii)(A), (b)(5)(vi)(L), but subsequently authorizes the agency to decline to file suit if it is unlikely to lead to repayment. *Id.* §§ 682.410(6)(vii)(B). Under the FDCPA,

> however, a collector who states that it will file suit, but does not actually intend to do so, may be sued for "false misrepresentations," 15 U.S.C. §§ 1692e(4), (5).

In short, the Ninth Circuit's ruling creates a Hobson's choice for nonprofit guaranty agencies. On the one hand, a nonprofit guaranty agency that complies with HEA will risk FDCPA liability; on the other hand, such an agency that does not comply with HEA will face a range of possible sanctions by the Secretary, including possible suspension from the FFEL program. *See* 20 U.S.C. § 1082(h)(1); *see also* 34 C.F.R. §§ 682.410(c), 682.413(c)(1). As the following discussion illustrates, the mere existence of these conflicting directives detrimentally impacts the administration of the FFEL program and harms its ultimate beneficiaries, the student borrowers.

A. The Ninth Circuit's Ruling Injects Uncertainty Into the FFEL Program

Nonprofit guaranty agencies now face serious uncertainty in attempting to conduct their daily collection operations. As noted, the nation's network of guaranty agencies is responsible for administering hundreds of thousands — and, in the case of USA Funds, millions — of student loans. (In Fiscal Year 1996 alone, petitioner USA Funds serviced over 1,320,000 loans valued at approximately $5.3 billion. *See* United States Department of Education, Office of Postsecondary Education, Loan Volume Update, Federal Family Education Loan Program, Fiscal Year 1996, at 6 (Jan. 1997)). For each loan that goes into default, HEA regulations require a guaranty agency to initiate collection activities, within 45 days after it paid the default payment to the lender, by sending written notices directly to each defaulted borrower and "diligently" attempting to contact the

borrower by telephone. *See* 34 C.F.R. §§ 682.410 (b)(6)(iii)(A)-(B).

Thus, before collection activities are even initiated on the first defaulted loan, a guaranty agency must confront its conflicting obligations. To whom should the initial notices be sent? HEA regulations require the notices to be sent to the borrower directly;[10] but if, as is often the case, the borrower is represented by counsel, the FDCPA prohibits direct contact with the borrower and requires contact to be made through counsel. *See* 15 U.S.C. § 1692c(a)(2). Thus, the seemingly straightforward task of sending notice takes on a new dimension if a nonprofit guarantor must also take into account the subject ruling of the Ninth Circuit.

What if the borrower responds to the first notice and demands that the agency cease all further communications? HEA regulations require the guaranty agency to send additional notices to the borrower,[11] and to "diligently" attempt to contact the borrower by phone; the FDCPA, however, mandates that, upon written request by the borrower, a guaranty agency must cease any further contact with the borrower. *See* 15 U.S.C. § 1692c(c). Once again, an apparently routine task performed by a nonprofit guaranty agency on a daily basis is suddenly complicated by the potential for FDCPA liability.

Resolution of these conflicting mandates must be prompt to comply with the 45-day window established by HEA regulations.[12] Yet the resolution of these issues is only the beginning of the conflict between these statutory schemes,

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[10] *See* 34 C.F.R. § 682.410(b)(6)(iii) (1996) ("[T]he agency shall ... *[s]end to the borrower* the written notice ... and ... [d]iligently attempt to contact *the borrower* by telephone.") (emphases added).

[11] *See* 34 C.F.R. §§ 682.410(b)(5)(ii), (6)(iii).

[12] *See* 34 C.F.R. § 682.410(b)(6)(iii).

not the end of it. HEA regulations next requires guaranty agencies to undertake certain activities over the next 135 days, activities that includes contacting the borrower by telephone, sending at least three notices "forcefully demanding" repayment, and advising the borrower of the possibility of civil litigation in the event of continued nonpayment. *See* 34 C.F.R. §§ 682.410(b)(6)(iv)(A)-(B). Although a nonprofit guaranty agency must advise the borrower of the possibility of litigation, the regulations give the agency discretion to decline to pursue such litigation if, for example, it concludes the borrower would not be financially able to pay the debt. *See* 34 C.F.R. §§ 682.410 (b)(6)(vii)(B)(1)-(2).

Under the Ninth Circuit's reading of the FDCPA, however, a nonprofit guaranty agency could be subject to suit for making a "false representation" by advising the borrower of the possibility of filing suit if it did not actually intend to file suit. *See* 15 U.S.C. §§ 1692e(4), (5); *see also Juras v. Aman Collection Service, Inc.*, 829 F.2d 739, 744 (9th Cir. 1987) (reversing the district court's dismissal of plaintiff's FDCPA claim against an independent collection agency based on an allegedly false representation; "[i]f [the collection agency] did not intend to employ counsel in California [as it stated], this threat violated the [FDCPA]."), *cert. denied*, 488 U.S. 875 (1988). Thus, in addition to the concerns about whom it may contact and whether such contact is permissible, a nonprofit guaranty agency now must also consider the possibility of litigation arising out of a representation that it may ultimately file suit.

Yet this FDCPA-induced hesitation is contrary to the goal of HEA: forceful collection, through potential and actual litigation, of defaulted student loans. Indeed, in a recent report, the Department reaffirmed the efficacy of the aggressive use of civil litigation as a means of obtaining

payment from defaulting student borrowers. *See* Report to the President at 3.[13]

The Ninth Circuit's ruling, moreover, imperils nonprofit guarantors with their regulator, the Department. Each of the "due diligence" activities described above (and others) must take place within a specified time period. If in the course of conducting these activities, a nonprofit guaranty agency fails to take any action within the prescribed time periods, or otherwise "violates any applicable Federal requirement," then the Secretary may withhold reinsurance payments from the guaranty agency, suspend or terminate its agreement with the agency, and even fine the agency for its noncompliance. *See* 34 C.F.R. §§ 682.413(c)(1)(ii), (iv), (v). But if the nonprofit guaranty agency does comply in a timely fashion with these requirements, it may face claims of civil liability under the FDCPA.

The imposition of FDCPA liability on nonprofit guaranty agencies thus creates an unworkable situation for the daily operations of nonprofit guaranty agencies and their employees. As a result of the Ninth Circuit's decision, these agencies now find themselves confronting an unmanageable situation. These concerns are real and immediate, directly affecting the agencies' ability to administer the FFEL program. Guaranty agencies must make important decisions involving these issues on a daily basis. Substantial sums of money are at issue, as is the ability of lenders and nonprofit guarantors to make funds available to all students wishing to

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[13] The continued successful use of civil litigation as a tool to combat defaulting student borrowers may well be stifled because of the newfound threat of FDCPA litigation. Whether asserted as a counterclaim in a suit brought by the guarantor to collect on a note or, as in this case, as a separate lawsuit initiated by a plaintiff-debtor, FDCPA claims against nonprofit guaranty agencies would likely become a commonplace feature in most civil suits seeking to vindicate the federal interest by collecting on a defaulted loan payment.

pursue higher education. At a minimum, the Ninth Circuit's extension of the FDCPA to nonprofit guaranty agencies unjustifiably interferes with the orderly administration of the FFEL program by infusing uncertainty into the decisionmaking process. Accordingly, review should be granted to resolve these conflicts and restore stability to the FFEL program.

B. The Ninth Circuit's Ruling Creates An Intolerable Threat of FDCPA Liability

The mere threat of FDCPA liability will inevitably deter some nonprofit guaranty agencies from vigorously engaging in the "due diligence" activities mandated by HEA regulations. As noted above, the Ninth Circuit's ruling will deter the use of civil litigation as an effective tool for securing repayment from defaulting borrowers. *See supra*, at 11 & n.13. This ruling has other deleterious consequences. For example, the threat of FDCPA claims by debtors against nonprofit guarantors will result in higher overall loan default rates because of diminished collection efforts. Higher rates, in turn, place an unnecessary strain on the federal fisc (and the cost of operating the FFEL program), whose funds are used to compensate guaranty agencies for default payments to lenders. Ultimately, the depletion of available monies will restrict the number of students who may obtain federal funds to pay for their college education.

As an organization whose members are dedicated to expanding, rather than limiting, the range and number of educational opportunities available to all students, NCHELP believes that the Ninth Circuit's ruling is contrary to the intent of both Congress and of the federal agencies charged with administering HEA and the FDCPA. Indeed, the Department and the Federal Trade Commission — the

federal agencies charged with enforcing HEA and the FDCPA, respectively — have explained their understandings that the FDCPA does not apply to nonprofit guaranty agencies. *See* Appendix to Petition for a Writ of Certiorari, United States Aid Funds, Inc., No. 96-1210, at 88a-95a (filed Jan. 29, 1997) (hereafter "Petitioner's Appendix"). Nevertheless, the possibility of FDCPA liability remains. At a minimum, the Ninth Circuit should be required to consider the impact of the Department's recent rulemaking declaration about the non-application of the FDCPA to guaranty agencies, 61 Fed. Reg. 60,478 (Nov. 27, 1996), Petitioner's Appendix at 98a, as suggested in USA Funds' petition for certiorari. *See* Petition for a Writ of Certiorari, United States Aid Funds, Inc., No. 96-1201, at 19 n.17 (filed Jan. 29, 1997) (hereinafter "Petition").

C. The Ninth Circuit's Ruling Undermines The Need For Uniformity

The FFEL program allows millions of Americans nationwide to obtain postsecondary education, and the administration of this program should be judged according to a single uniform standard of conduct. Ironically, although the subject ruling of the Ninth Circuit recognizes this need for uniformity in discussing the preemptive effect of the Secretary's regulations on inconsistent state law, *see* Petitioner's Appendix at 8a,[14] the opinion overlooks conflicting decisions from other jurisdictions that have held that the FDCPA does not apply to guaranty agencies. *See supra,* at 5 & n.6. In so holding, the Ninth Circuit has sought to eliminate the risks attendant to the application of inconsistent state law, while simultaneously creating an

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[14] NCHELP agrees with the Ninth Circuit's conclusion that HEA and its implementing regulations preempt inconsistent state law.

inconsistent body of federal law with respect to the applicability of the FDCPA. Respondent's claim highlights this inconsistency, involving as it does, a loan from a Kansas bank; a guaranty agency from Indiana; and a former student residing in Oregon who attended school in Oregon. *See* Petition at 18-19. As this typical factual scenario indicates, it will be extraordinary difficult for a nonprofit guaranty agency to know what circuit's law will be employed to judge the lawfulness of its actions.

While a lack of uniformity is unmanageable in most business settings, it is especially pronounced in the context of a large national program that involves multiple parties (borrowers, lenders and guarantors) that may, and often will, reside in different states within different circuits. Accordingly, review should be granted to establish a single uniform standard of conduct.

II. THE FAIR DEBT COLLECTION PRACTICES ACT DOES NOT APPLY TO THE COLLECTION ACTIVITIES OF PRIVATE NONPROFIT GUARANTY AGENCIES.

As the foregoing discussion makes clear, the application of the FDCPA to nonprofit guaranty agencies has had, and will continue to have, significant practical consequences on the day-to-day administration of the FFEL program. These consequences are serious and merit a greater degree of attention than the cursory discussion of the Ninth Circuit. For a variety of reasons — which are adequately and cogently set forth in USA Funds' petition for certiorari, *see* Petition at 14-24 — NCHELP fully agrees that the FDCPA does not apply to any guaranty agency, and that Congress did not intend for it to so apply. NCHELP will not burden the Court by repeating the arguments supporting this conclusion; however, NCHELP does wish to reemphasize

one of those points which is of significant importance to its members.

By its own terms, the FDCPA exempts from its coverage "government actors," namely, "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). Nonprofit guaranty agencies are "government actors" under the FDCPA. These agencies operate at the explicit command of the federal government, pursuant to the terms of federal agreements, and the requirements of federal statutory and regulatory law; and they perform functions identical to those performed by their state guaranty agency counterparts. Indeed, the *only* entities that may act as loan guarantors under HEA are private nonprofit guaranty agencies and State guaranty agencies. *See* 20 U.S.C. § 1078(b)(1); 34 C.F.R. § 682.200 (defining a "guaranty agency" as a "State or private nonprofit organization"); *see also Games v. Cavazos*, 737 F. Supp. 1368, 1382 (D. Del. 1990) ("The loan is insured by a State or private guarantee agency such as USA Funds."); *id.* at 1388 ("The Guaranteed Student Loan Program may be administered by either a State guarantee agency or a private non-profit agency such as USA Funds.").

Games, 737 F. Supp. 1368, considered this issue and concluded that USA Funds was in fact a "government actor" so as to be exempt from the FDCPA.[15] *Id.* at 1387-88. The *Games* court relied heavily on the fact that USA Funds "administer[ed] a federal government program involving federal funds," *id.* at 1388, and that it had "entered into numerous [contractual] agreements" with the Department of Education. *Id.* at 1382. The *Games* court also noted the

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[15] At issue in *Games* was USA Funds' participation in the federal tax offset program for recovery of defaulted student loan guarantees.

anomaly that would result if private nonprofit guaranty agencies like USA Funds were subject to the FDCPA, given the fact that their State counterparts would be excepted from such liability under the government actor exemption. "Since State guarantee agencies would not be subject to the FDCPA for their participation in the GSL Program, private guarantee agencies like USA Funds should likewise be protected." *Id.* at 1388.

Finding this rationale persuasive, the district court in this case concluded that "the FDCPA should not apply to private guarantee agencies under the GSL program." Petitioner's Appendix at 28a. The district court discussed *Games* extensively, and relied on the fact that USA Funds was "contractually bound" to engage in its "due diligence" requirements under HEA regulations. *Id.* at 27a. The Ninth Circuit's cursory, four-sentence discussion of the "government actor" exemption — which concludes that USA Funds is a private entity and not a government actor — begs the question by failing to address any of the contrary arguments espoused by the *Games* court or the district court that support the opposite conclusion.

CONCLUSION

For all of these reasons, NCHELP urges this Court to grant United Student Aid Funds, Inc.'s petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1996

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v.

APRIL BRANNAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circui

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REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

I.
INTRODUCTION

At issue in this case is a collision between the Higher Education Act (HEA) and the Fair Debt Collection Practices Act (FDCPA). The federal agencies charged with administering these Acts -- the U.S. Department of Education (ED) and the Federal Trade Commission -- are singular in their view that the FDCPA does not apply to non-profit student loan guaranty agencies such as the petitioner. ED furthermore has expressed its view that the Ninth

Circuit's decision in this case will undermine key federal objectives in redressing student loan defaults. The national association of student loan guaranty agencies has expressed its view as *amicus* that the Ninth Circuit's decision will sow chaotic uncertainty in our Nation's system of guaranteed student lending.

In the face of concern from all responsible quarters that the Ninth Circuit's decision threatens ED's reticulated scheme of student loan enforcement, respondent blithely asserts: "That regulations adopted by the DOE pursuant to the HEA are allegedly in conflict with the FDCPA is of no moment. It is axiomatic that a regulation which is contrary to law cannot be enforced." (Opp. 4).

Creation of inconsistent legal obligations from two statutory and regulatory schemes, however, is of very great moment. Whatever the resolution of this issue -- and we urge that, as ED and amicus have agreed, the Ninth Circuit's decision is fundamentally flawed -- the issue plainly merits review. Indeed, respondent's opposition highlights the necessity for review before the keen national interest in addressing student loan defaults is further imperiled.

II.
REPLY ARGUMENT

A. The Opposition Highlights An Issue of Fundamental and Recurring Significance.

To the extent that respondent acknowledges the inconsistent legal obligations imposed by the HEA and the FDCPA under the Ninth Circuit's reading of those Acts, her subsequent arguments illustrate the need for review. Besides

her "axiomatic" call for the *ab initio* invalidity of unspecified ED regulations, respondent urges in lieu of *certiorari* review that ED should modify its regulations (opp. at 6 & n.2); or that Congress should resolve the statutory collision through amendments (apparently to one or both statutes) (*id.*).

Petitioner agrees with respondent that the statutory collision is a problem of national scope. We agree that, if unaddressed, the collision directly implicates the legislative and executive branches of the federal government. And while respondent's calls for action by Congress and ED are misdirected, they richly illustrate the need for review. The conflicting obligations of the HEA and the FDCPA are not the result of statutory or regulatory anomalies; rather, they are the artifact of a Ninth Circuit decision that conflicts with all earlier agency interpretations and most earlier judicial decisions. The Court should consider the Ninth Circuit's decision before it necessitates legislative and administrative action.

To the extent that respondent alternatively asserts that there is no statutory collision, her argument again merely highlights the need for review. In an attempt to deflect attention from the obvious significance of the conflict created by the Ninth Circuit, respondent offers newly-minted theories that nowhere have been adopted by any court or administrative agency and that, in many instances, directly conflict with the pertinent agency's interpretation.

For example, respondent asserts that:

- "Due diligence" is a term of "no substance" that is "intangible," like "urging a child to 'play hard'." (Opp. at 6 & n. 2.) Neither the HEA[1] nor ED's implementing regulations[2] countenance this dismissive interpretation.

- Administrative wage garnishments by a guaranty agency pose only "technical" conflicts between the HEA and the FDCPA. (Opp. at 6) Yet Congress expressly authorized guaranty agencies to undertake administrative wage garnishment, 20 U.S.C. § 1095a(a) (1994), and there is no exception under the FDCPA for respondent's self-styled "technical" violations.[3]

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[1] 20 U.S.C. § 1078(c)(2)(A) specifically requires a program agreement which "shall set forth such administrative and fiscal procedures as may be necessary to protect the United States from the risk of unreasonable loss thereunder, * * * and to assure that due diligence will be exercised in the collection of loans insured under the program, including a requirement that each beneficiary of insurance on the loan submit proof that reasonable attempts were made to locate the borrower (when the location of the borrower is unknown) and proof that contact was made with the borrower (when the location is known)." (Emphasis supplied).

[2] ED's regulations describe "diligence" in concrete terms: *inter alia*, two telephone calls to the borrower "to demand repayment of the loan" (34 C.F.R. § 682.410(b)(6)(iv)(A), *quoted at* App. 72a), and "at least three written notices to the borrower forcefully demanding that the borrower immediately commence repayment of the loan * * *." (34 C.F.R. § 682.410(b)(6)(iv)(B), *quoted at* App. 72a.)

[3] Respondent confidently promotes two "easy" remedies to this "technical" conflict: the cessation of garnishment activities by guaranty agencies, or a statutory amendment -- neither of which is "easy" and both of which represent a significant change in existing law. (Opp. at 6 & n.2).

- Both USA Funds and the district court (at App. 27a) "misrepresented" the regulatory requirement of direct contact with a debtor, when in actuality there is no such requirement. (Opp. at 6). Yet ED has stated that the FDCPA's prohibition on direct cont act would impose conflicting legal obligations on non-profit student loan guaranty agencies like USA Funds.[4]

While these and other arguments about the supposed laxity or flexibility of ED's "due diligence" regulations are without merit,[5] they presage recurrent and increased confusion about the legal obligations of non-profit student loan guaranty agencies. Left unreviewed, *Brannan* at the very least would require courts to parse ED's due diligence regulations *vis a vis* the FDCPA, with highly uncertain and variable results for guaranty agencies forced to make day-to-day administrative decisions based on how future courts in

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[4] The U.S. Department of Education has explained that "[t]he FDCPA for example, would bar guarantors from direct contact with debtors represented by counsel, and would prohibit continued attempts to persuade borrowers to resume repayment after demands that contact cease. * * * These restrictions, accompanied by the risk of substantial penalties for even technical violations, could only tend to deter guarantor compliance with the collection process already established by the Department." (App. 92a.)

[5] For example, respondent places weight on the distinction between threats of actions that a guaranty agency will take (which she finds more offensive under the FDCPA), and multiple actions that a guaranty agency may take (which she finds less offensive). That position is directly at odds with paragraph 8 of her complaint, in which she seeks to recover under 15 U.S.C. § 1692e(5) for statements by USA Funds that tax offset "may" occur or that a lawsuit "may" occur.

unknown jurisdictions will construe ED's regulations in view of the FDCPA's conflicting mandate.

Touting the "fact intensiveness" of the issues underlying an FDCPA claim (opp. 8), respondent also argues that USA Funds has invoked ED's views in a supposedly different situation of "guaranty agencies collecting student loans in their 'own names.'" (Opp. at 7). While respondent's arguments again are substantively without support,[6] they point to a more basic reality of this and future litigations. This suit is about far more than a debtor promoting a "fact intensive" claim for monetary relief under the FDCPA. It is about a litigation weapon in the hands of student loan defaulters, a weapon that will worsen the serious national problem of defaulted student loans. This is so because defaulted student loans under the FFEL program tend to be small. Respondent's loan, for example, was for $2,371.72, on which summary judgment was entered for USA Funds and no appeal was pursued. (App. 34a). Defaulted student loans like respondent's comprise a serious national problem (in the many billions of dollars) not because they are individually large, but because there are so many of them.

Armed with FDCPA counterclaims after *Brannan*, student loan defaulters with no defense to their debt will be empowered to threaten a "fact intensive" counterclaim that,

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[6] ED has urged under the very circumstances of this case that "[t]he ruling that USA Funds is subject to the FDCPA appears to rest on a misreading of a Departmental statement but more importantly directly conflicts with the long-standing views of the Federal Trade Commission and the Department that, for reasons not addressed in the decision [at the panel stage], the FDCPA does not apply to guarantors." (App. 88a).

in terms of defense counsel fees alone, will quickly make prosecution of the underlying debt economically unviable. *Brannan*, in short, will result in more unredressed defaults: whether through a guaranty agency's non-compliance with ED's "due diligence" regulations, or through allegations of FDCPA violations after a guaranty agency has complied with "due diligence" -- allegations that all too often will force abandonment of the debt once they are posed in an FDCPA counterclaim.[7]

B. There Are Ample Bases for *Certiorari* Review

Respondent contends that "there is no conflict with the 9th Circuit Opinion and a decision by the highest court of any state," and that review is therefore "unwarranted." (Br. at 8). For two reasons, her argument does not raise an impediment to review.

First, even if there were no conflict at all, the Ninth Circuit's decision -- conflicting as it does with the settled administrative interpretations of two important federal statutes and threatening to disrupt daily implementation of a multi-billion dollar program -- would merit this Court's review.[8]

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[7] Taking respondent as an example, her FDCPA *ad damnum* exceeds the amount of her debt.

[8] In a footnote, Ms. Brannan recites the Ninth Circuit's characterization of a statement made by USA Funds before the Ninth Circuit panel (Opp. at 9, n.7). Ms. Brannan does not dispute that USA Funds merely was defending the district court's judgment on its own terms, as our petition explains. (Pet. at 12-13, nn. 11-12). Moreover, petitioner placed the whole statute at issue by arguing before the Ninth Circuit panel that Congress "did not intend for the FDCPA to apply to [non-profit]

Second, in contrast to respondent's submission, the Iowa Supreme Court in *Fischer v. UNIPAC Service Corporation*, 519 N.W.2d 793, 799 (1994) held that "collection efforts by holders of federally insured student loans * * * are simply not the kind of activity Congress intended to regulate [in the FDCPA]." *Id.* (emphasis added) Without a doubt, *Fischer* is in direct conflict with the Ninth Circuit's holding. *See also, e.g., Games v. Cavazos*, 737 F. Supp. 1368, 1389 (D. Del. 1990) ("I am convinced that Congress did not intend the FDCPA to apply to guarantee agencies administering the GSL Program in cooperation with ED.").

C. The Ninth Circuit's Decision Poses Concrete and Substantial Risks to the Federal Fisc.

Respondent contends that the asserted costs to the public fisc of the statutory collision are unreliable, insupportable, and "speculative." (Opp. at 5).[9]

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guaranty agencies" (Pet. App. 4A) and the Ninth Circuit explicitly reached that question. *Id.* Accordingly, as in the Court of Appeals, the fundamental question -- whether non-profit student loan guaranty agencies comprehensively regulated under the HEA also are subject to the FDCPA -- is squarely before the Court.

[9] Part of Respondent's argument is that USA Funds ascribes a cost to the public fisc of having to forego "abusive or harassing collection activities which violate the FDCPA." (Opp. at 5). That of course is not our argument, and our petition explained that any allegations of untoward behavior on the part of a guaranty agency can be addressed by the U.S. Department of Education in its administration of the guaranteed student loan program. (Pet. at 7).

Our petition explains the legislative history decrying high default rates and their impact on the federal fisc. (Pet. at 4-5.) Simply put, respondent's loan default is part of a serious national problem. For example, loan defaults increased over 300% in the 1980s, and as of the early 1990s, "more than half of the government's [FFELP] cost[s] [went] to pay for defaulted loans from the past rather than to subsidize education and training for today's students."[10]

The adverse impact on our Nation's taxpayers could not be clearer, as non-profit student loan guaranty agencies face a Hobson's choice between non-compliance with ED's regulations and alleged non-compliance with the FDCPA.[11] Either way, and absent review by this Court, the Ninth Circuit's far-reaching decision unnecessarily places billions of federal dollars at risk.

III.
CONCLUSION

For all of these reasons, and the reasons set forth in the Petition, we respectfully pray for the grant of a writ of *certiorari*.

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[10] S. Rep. 102-58, 102d Cong, 1st Sess. at 1 (1991).

[11] *See also, e.g.*, 137 Cong. Rec. v. H10209 (daily ed. Nov. 11, 1991) at H10209 (remarks of Congressman Solomon in support of administration wage garnishment) ("[N]othing aggravates the American taxpayer more than this issue. After living up to their own obligations and paying off their own loans at great personal sacrifice and suffering in many cases, they have then to shell out more taxes to foot the bill for those who refuse to pay back their own debts. * * * The reform proposal will greatly lessen the possibility of such defaults by requiring * * * more information to enable us to track and locate the borrower once he leaves school * * *.")

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1996

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Petitioner,

v.

APRIL BRANNAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF OF THE PETITIONER

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SUPPLEMENTAL BRIEF OF THE PETITIONER

Pursuant to S. Ct. R. 15.8, petitioner United Student Aid Funds, Inc. files this Supplemental Brief to apprise the Court of a recent decision that was not available at the time petitioner filed either its Opening Brief or its Reply Brief.

In *Sibley v. Diversified Collection Services, Inc. et al.*, Civ. No. 3:96-CV-0816-D (N.D. Tex. June 10, 1997), the district court relied on the Ninth Circuit's decision in *Brannan* to conclude that petitioner is subject to the federal Fair Debt Collection Practices Act ("FDCPA").[1] Op. at 16.

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[1] Ten copies of the *Sibley* opinion have been lodged with the Office of the Clerk.

The district court also considered — and rejected — the position of the United States Department of Education that the FDCPA does not apply to non-profit student loan guaranty agencies like petitioner, concluding simply that the Department's interpretation "is without persuasive support." *Id.* at 18. The district court similarly rejected the position of the Federal Trade Commission that the FDCPA does not apply to nonprofit student loan guaranty agencies like petitioner. *Id.* at 18 & n.13.

Sibley illustrates, and indeed highlights, the urgent need for review of the Ninth Circuit's decision in this case. The Ninth Circuit's far-reaching holding will not be confined to that Circuit; will not be confined to cases in the same procedural posture; and will perpetuate the adverse consequences of the irreconciliably conflicting obligations imposed by the Higher Education Act and the FDCPA.[2]

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[2] *Sibley* also cited the *Brannan* dissent, which is relied upon by the petitioner in *Brannan v. United Student Aid Funds, Inc.*, No. 96-7746, *petition for cert. filed* (U.S. Jan. 29, 1997). *See* Op. at 23. The *Sibley* court denied motions to dismiss state law claims on the basis of preemption "without prejudice to [the defendants] later demonstrating that specific claims directly conflict with the collection requirements imposed by federal law." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

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